Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

NICHOLAS A. DIGIRLAMO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

–and–

CHARLES M. CARBERRY, ESQ.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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104 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner, an employee of a local of the International Brotherhood of Teamsters, was charged with violating the Union Constitution by "bringing reproach" upon the union by "knowingly associating" during a 14 year period, with members and associates of La Cosa Nostra, including but not limited to six named persons. The charge was sustained and he was terminated from employment and banned from union membership for life.

1. Was the non specific charge a denial of due process in violation of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(5)(A) and (C) which require written specific charges and a full and fair hearing, as construed by this Court.

2. Was there a further denial of a full and fair hearing by the fact that under the procedures followed the person charged has no right to pre-hearing discovery, the names of witnesses or a Bill of Particulars?

3. Are the provisions of the Union Constitution and the Consent Decree prohibiting conduct bringing "reproach" on the IBT by "knowing association with members of organized crime," impermissibly vague and overbroad, as applied to the conduct of Petitioner, denying due process by failing to give adequate notice that innocent familial associations and legitimate professional activities unrelated to union affairs are prohibited?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Nicholas A. DiGirlamo, and the Respondents, United States of America and Charles M. Carberry. The International Brotherhood of Teamsters, et al. named as defendants in the caption below were defendants in the original RICO action, but were not parties to the proceedings against Nicholas A. DiGirlamo below, brought under the Consent Decree.

The respondents before this Court are the United States of America and Charles M. Carberry, Esquire.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Nicholas A. DiGirlamo prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered March 24, 1994.

REFERENCE TO OPINIONS BELOW

The Opinion of the United States Court of Appeals For the Second Circuit is reported at 19 F.3d 816 and is printed as Appendix A hereto. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing and the Judgment of the Court of Appeals affirming the Judgment of the District Court are not reported and are printed as Appendix B. The judgment of the United States District Court for the Southern District of New York affirming the decision of the Independent Administrator is reported at 824 F.Supp. 410 and is printed as Appendix C. The decision of the Independent Administrator is not reported and is printed as Appendix D.

JURISDICTIONAL STATEMENT

The appeal to the Court of Appeals was from a final order of the Honorable David N. Edelstein, Judge of the U.S. District Court for the Southern District of New York, dated June 22, 1993. The District Court had subject matter jurisdiction pursuant to the Consent Decree entered in *United States v. International Brotherhood of Teamsters, et al.*

88 Civ. 4486 (S.D.N.Y.) (DNE). The Court of Appeals ha jurisdiction pursuant to 28 U.S.C. § 1291 since the Ord appealed from was a final Order of the District Cour *United States v. IBT*, 905 F.2d 610 (2d Cir. 1990).

The Opinion of the United States Court of Appeal for the Second Circuit was entered on March 24, 1994 Petitioner's Petition for Rehearing was denied on Apri 22, 1994. The Order and Judgment affirming the Judg ment of the District Court was filed April 24, 1994 and issued as mandate on May 2, 1994. The jurisdiction of this court to review the final decision of the Court of Appeals is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29: Section 411(a)(5). Safeguards against improper disciplinary action.

No member of any labor organization may be fined, suspended expelled or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

UNION CONSTITUTION PROVISIONS INVOLVED

Article II, Section 2(a) mandates that all members shall conduct themselves "at all times in such a manner as not to bring reproach upon the union . . . "

Article XIX, Section 7(b), sets forth a non-exhaustive list of grounds for bringing disciplinary charges. That list includes:

> (1) Violation of any specific provision of the Constitution, Local Union By-Laws or rules of order, or failure to perform any of the duties specified thereunder.
>
> (2) Violation of oath of office or the loyalty to the Local Union and International Union.
>
> * * *
>
> (9) Knowingly associating (as that term has been defined in prior decisions and disciplinary charges under this Article) with any member or association of any organized crime family or any other criminal group.

STATEMENT OF THE CASE

In 1988, the United States government filed a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, against the IBT, its General Executive Board (Board), the members of the Board, the Commission of La Cosa Nostra (LCN) and individual members and associates of LCN. The government alleged that LCN, through a pattern of racketeering activity, had infiltrated and come to dominate the IBT. The suit sought equitable relief to rid the union of LCN's corrupt influence.

In 1989, the government's claims were settled by a Consent Decree which prohibits IBT members from "knowingly associating" with members or associates of

organized crime groups. The Consent Decree also provides for the appointment of an Investigations Officer to investigate corruption and misconduct within the union and an Independent Administrator (Administrator) whose duties include hearing and deciding union disciplinary charges. The Administrator's decisions in disciplinary cases are subject to review in the district court.

In May 1992, the Investigations Officer brought disciplinary charges against Petitioner, then a member and employee (bookkeeper) of an IBT local.[1] The charges were that Petitioner had knowingly associated with members and associates of LCN including, but not limited to, six named persons, among them Charles Moretina and James Moretina, Petitioner's father-in-law and brother-in-law, respectively. By knowingly associating with these organized crime figures, the Investigations Officer charged, DiGirlamo had brought reproach upon the IBT in violation of his IBT membership oath. Under § 7(b) of the IBT Constitution, violation of the membership oath is grounds for disciplinary action. As required by the Consent Decree, a hearing was held before the Administrator.

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[1] The charge reads as follows:

While a member and employee of IBT Local 41, you brought reproach upon the IBT and violated your membership oath in violation of Article 11, Section 2(a) and Article XIX, Section 7(b)(1) and (2) of the IBT Constitution, to wit:

From 1978 to the present, while a member and employee of IBT Local 41, you knowingly associated with members of La Cosa Nostra ("LCN"), including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone, and Frank Anthony Tousa. From 1978 to the present, you also knowingly associated with associates of LCN including, but not limited to, John Anthony Costanza and Nicholas Joseph LaBruzzo.

Prior to the hearing Petitioner's counsel had filed a Petition for Pre-hearing Production of Evidence in which he requested an Order that the Investigations Officer produce all evidence prior to hearing and a list of all witnesses and that the evidence be limited to association with the six persons named in the charge. By letter Petitioner's counsel also requested that the evidence be limited to that relating to the specifically named persons, pointing out that in the 211 page sworn statement taken of the petitioner he had been questioned as to numerous other persons.[2] The letter also requested that the charge of "associations" be specific as to dates or at least periods of time. It further requested that the Administrator direct the Investigations Officer to specify in advance of hearing those portions of Petitioner's statement upon which he relied.

The Administrator responded by letter in which he stated:

> I now turn to your June 8, 1992, "Petition For Pre-Hearing Production of Evidence and Order". The Consent Order "does not give an IBT member against whom disciplinary charges have been filed any right to pre-hearing discovery." *United States v. IBT*, 764 F.Supp. 797, 800 (S.D.N.Y. 1991). Notwithstanding that, to insure a "fair and impartial hearing" as mandated by the Consent Order, the Investigations Officer, consistent with past practice, will provide you materials to be introduced in evidence. He has acknowledged in his June 8, 1992 letter that you

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[2] DiGirlamo was questioned as to his associations with 69 persons.

> will have these materials "at least one week in advance" of the hearing.
>
> As for your request for a "list of witnesses" that the Investigations Officer "intends to call at the hearing," I have consistently rejected such requests as improper as they are nothing more than a "Bill of Particulars." *See, e.g., United States v. IBT*, 745 F.Supp. 908, 914 (S.D.N.Y. 1990) (district court affirmed Independent Administrator's rejection of a Bill of Particulars).
>
> In addition, I will not, as you request, enter an order limiting the Investigations Officer's evidence. Your request for such an order is premature. At the hearing and in your post-hearing submissions, you will have an opportunity to raise objections to the Investigations Officer's evidence.
>
> Lastly, I will not order the Investigations Officer to indicate which pages of the 211-page deposition will be offered into evidence in advance of the hearing.[3]

Exhibits totaling 892 pages were provided Petitioner a few days before the hearing. The only evidence in behalf of the Investigations Officer at the hearing was the

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[3] The prehearing motions and correspondence appear in the record in the Appendix to Respondent's Supplemental Memorandum in the District Court and the Reply Brief of Appellant, at App. 1-4.

hearsay testimony of an FBI agent and all the exhibits previously provided.

In January 1993, the Administrator found (Appendix D) that the Investigations Officer proved by a preponderance of the evidence that Petitioner had knowingly associated with LCN members Charles Moretina, Simone, James Moretina and Tousa. The Administrator ordered Petitioner permanently barred from the IBT. In June 1993, Judge Edelstein filed an Opinion and Order affirming the Administrator's decision (Appendix C). Petitioner appealed from that decision to the Court of Appeals which affirmed the District Court Decision (Appendix A).

The Court of Appeals held (Appendix A7) that there was substantial evidence that Petitioner knowingly associated with the four persons and that they were LCN members. However there was no evidence that the criminal acts of any of them involved any corruption of the IBT.

Petitioner was not an LCN member or associate and was not charged with any misconduct during his 14 year union membership, either in relation to the union or otherwise. He was the bookkeeper for the Local from 1980 to 1985 (A. 214, 241). and then from 1989 until 1992 (A. 253). He was never a union officer or official. He was well qualified, with college degrees in accounting and business administration and experience as an auditor for the city for five years (A. 129). His performance as the union bookkeeper was of a high quality (A. 89,236). He had no control of union funds, did not authorize expenditures or in any way influence the union affairs, and was not involved in policy or decision making (A. 86-87).

The Court of Appeals findings as to his associations were[4]:

1. *James Moretina.* Moretina, his brother-in-law, helped Petitioner find a job on the loading docks in 1978 and in 1980 assisted him in getting the union bookkeeping job. He hired Petitioner to do bookkeeping (sic) for "Be Amused" vending machine company during the period when Petitioner was not employed by the union and continued after he returned to his union job. Moretina often telephoned Petitioner at the union. In one telephone call they discussed how to get a dentist on a union list of referrals and in another discussed union rivalries in an upcoming union election. Moretina was convicted in 1991 of laundering illegal gambling money through "Be Amused's" operation of illegal video poker machines (Opinion. Appendix A7-8)

However the undisputed evidence was that Petitioner was an outside accountant, not a "bookkeeper" for Be Amused and his only work consisted of once a month tabulating the receipts and disbursements and payroll reports for which he was paid a monthly fee of from $60 to $100. He was not aware of the illegal use of the video poker machines (A. 140, 206, 264, 266). His name did not appear in any of the news items reporting the illegal activities (A. 141-2).

2. *Charles Moretina.* Before Moretina's conviction in 1983 Petitioner saw his father-in-law "one or two times, maybe more" each month. He attended Moretina's trial in

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[4] We detail what we consider the salient facts. The entire opinion is Appendix A.

1983. During the trial, Petitioner's car and a car belonging to a union organizer were observed parked outside Moretina's home during business hours. After Moretina's conviction, Petitioner remained in contact with him. He traveled twice to visit Moretina in prison and spoke to him on the phone several times (Opinion. Appendix A9). Moretina was still in the penitentiary at the time of the hearing.

3. *Peter Simone.* They attended grade school together. They played together in a sports league. Simone who worked for "Be Amused" sometimes called Petitioner at the local to pick up the books (Opinion. Appendix at A10).

4. *Tousa.* Petitioner testified he had been to Tousa's home in 1986 or 1987 and he prepared a tax return for Tousa and his wife in 1985 or 1986 (Opinion. Appendix A11). (The one visit to Tousa's home was in connection with preparing the tax return. This was during the period when Petitioner was not employed by the union) (A. 173-4).

The Court of Appeals' Opinion (Appendix at A13) states that in 1990 a confidential FBI informant stated that LCN used Petitioner to keep apprised of Local 41's financial status so that its president could not cite lack of funds as grounds for refusing to follow LCN orders. This was unreliable hearsay, the FBI Agent admitted that it was not corroborated by any other evidence (A. 77). It was denied by the union president and Petitioner and was not even referred to or relied on by the Administrator or the District Court in their Opinions.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' HOLDING, THAT TH CHARGE COMPLIES WITH THE LMRDA REQUIRE MENT OF SPECIFICITY AND FAIR HEARING, CON FLICTS WTIH DECISIONS OF THIS COURT AN OTHER CIRCUITS.

A. Lack of Specificity of the Charge.

The charge[5] violates the due process requirement o specificity mandated by the LMRDA, 29 U.S.C § 411(a)(5)(A). It charges that Petitioner while a membe and employee of IBT during a 14 year period brough reproach on the union by knowingly associating with si named and other unidentified members of LCN. The charge encompasses the entire period of his union membership. It does not identify any specific acts of alleged association. There are no facts stated as to specific occurrences, nor the time or place, nor names of witnesses. By the use of the language "but not limited to," the charge left Petitioner to speculate as to any number of unidentified persons with whom he might have associated and any number of unknown events. Except for the six names, the charge merely restates the provisions of the Union Constitution which Petitioner is charged with violating.

The Court of Appeals Opinion (at Appendix A14) held the argument of lack of specificity without merit, cursorily commenting that "the LMRDA does not require of disciplinary charges the level of specificity required in criminal cases," citing *Berg v. Watson*, 417 F.Supp. 806, 810

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[5] See note 1, supra.

(S.D.N.Y. 1976). The Opinion ignored the holding of this Court, of other Circuits and an earlier decision of the Second Circuit which do uphold and delineate the requirement of specificity under the LMRDA.

This Court in *Boilermakers v. Hardeman*, 401 U.S. 233, 91 S.Ct. 609, 617, 28 L.Ed.2d 10 (1971), reaffirmed a union member's right to "written specific charges." The Court recognized the power granted to federal courts by LMRDA, Section 411(a)(5)(A), to examine written charges to "determine whether the union member had been misled or otherwise prejudiced in the presentation of his defense." The charge against Hardeman contained a detailed statement of the facts relating to the fight that formed the basis of the disciplinary action. Such a notice, said the Court, satisfies Section 411(a)(5)(A). The Court did not indicate the minimal requirements as to specificity. However courts in several circuits have found charges inadequate which were more specific than in the instant case.

Gleason v. Chain Service Restaurant, 300 F.Supp. 1241, 1254-5 (S.D.N.Y. 1969) aff'd 422 F.2d 342 (2d Cir. 1970) held:

> "The circumstances surrounding an alleged disciplinary infraction by a union member, and time and place as nearly as can be ascertained, constitute minimal information that union should disclose to accused in order to afford him a reasonable opportunity to prepare his defense."

The court found fatally flawed a charge and specifications of failing to properly represent employees in grievance hearings during a three year period occurring in

various units of three companies (some specifica named). It found similarly flawed other compara charges and specifications, among them that of visit Union stores while intoxicated and unable to prope listen to or adjust grievances in a two year period. T deficiencies found were the failure to identify the stor the nature of the grievances, to delineate the inability adjust the grievance and lack of particulars as to tin place or circumstances.

In *Eisman v. Baltimore Reg. Joint Bd. of Amal. Clo Wkrs.*, 352 F.Supp. 429, 435 (D.C. Md. 1972) aff'd 496 F. 1313 (4th Cir. 1974) a charge containing "only a gener statement that on October 23, 1990 at the meeting of Loc 15 the plaintiff had in some unspecified manner 'acte with conduct unbecoming a member of the union an with conduct detrimental to the interests of the' ACWA was held not to contain the requisite detailed factu statement of the charges.

In *Jacques v. Local 1418, Int'l Longshoremen's Assn.*, 24 F.Supp. 857, 859, 860 (E.D.La. 1965) aff'd 404 F2d 703 (5t Cir. 1965), charges which did not refer to any particula time, place or circumstances and acts were held insuffi cient to inform the member with reasonable particularit of the details of the charges, as "demanded by fundamen tal notions of due process."

Berg v. Watson, 417 F.Supp. 806, 810-11 (S.D.N.Y. 1976 cited in the Court of Appeals Opinion (at Appendix A15 is clearly not supportive of the court's conclusion. To the contrary it held that "at a minimum the accused should be informed of the nature of the offense, the circum- stances surrounding the alleged infraction and as nearly

as may reasonably be ascertained, the time and place of the occurrence." citing *Jacques* and *Gleason* supra. The court found "fatally inadequate" a charge which charged violation of Berg's oath of obligation on or about a specific date by refusing to comply with an order by a Business Agency. The charge did list the witnesses who would be called.

B. Lack of Specificity in the Union Constitution Compounds the Deficiencies in the Charge.

The lack of specificity in the charge is not alleviated by its mere restatement of the language of the offense in the union constitution which is "Bringing reproach upon the union by knowing association with members of organized crime." This language is itself vague and overbroad and fails to give notice of the prohibited conduct. Union disciplinary proceedings based on vague and uncertain provisions in the union constitution are repugnant to traditional concepts of due process. *Semancik v. United Mine Workers Local,* 466 F.2d 144, 157 (3rd Cir. 1972) stated:

> "A requirement of specific charges serves little purpose when judged against vague, ill-defined union by-laws. Prosecutions of members in union disciplinary proceedings on the basis of such vague and uncertain provisions is repugnant to traditional concepts of due process."
>
> This lack of a standard of conduct also makes it difficult, if not impossible, for a union member to be adequately appraised of the charges against him in order to prepare his defense. Therefore, any such prosecution fails to meet the

specifically prescribed minimum due process requirements set forth in Section 101(a) (5). Cf. *Gleason v. Chain Service Restaurants*, 422 F.2d 342 (2nd Cir. 1970).

C. Fundamental Principles of Due Process a Applicable

Disciplinary actions by unions against its membe are subject to LMRDA. *Calhoun v. Harvey*, 379 U.S. 134, S. Ct. 293, 13 L.Ed 2d 190 (1964). The fundamental ar traditional concepts of due process apply to union disc plinary hearings. *Parks v. International Brotherhood of Ele trical Workers*, 314 F.2d 886, 912 (4th Cir. 1963), cer denied, 372 U.S. 976, 83 S.Ct. 1111, 10 L.Ed. 142. *Falcone Dantinne*, 420 F.2d 1157, 1165 (3rd Cir. 1969).

D. Accused's Knowledge Does Not Cure Non specific Charge.

Independent knowledge of the accused as to the ci cumstances of his alleged wrong doing will not excus the union's failure to comply with the specificity require ments of the Act. *Gleason v. Chain Service Restauran* supra, 300 F.Supp. at 1253. *Eisman v. Baltimore Reg. Join Bd. of Amal. Cloth. Wkrs.*, supra, 352 F.Supp. at 435.

E. Lack of Specificity is Aggravated by Time Span

The lack of specificity is further aggravated by the 1 year time span of the charge. In *Gleason v. Chain Servic Restaurants*, supra, 300 F.Supp. at 1253, citing th LMRDA, the court stated "the vice of this generalized

accusation is aggravated by the fact that the charged events allegedly occurred over a three-year period . . . "

F. Specificity Required By Broad Scope of the Charge.

The specificity requirement is particularly essential where the misconduct alleged is a broadly stated course of conduct. This is not a charge of a specific act of misconduct such as embezzlement. There the nature of the offense itself gives the member some clues as to what he is charged with.

Not so in a general and vague charge of "knowing association" over a 14 year period. Petitioner was left to speculate as to which of hundreds of persons with whom he associated in that period, (both in union activities, and otherwise) will be the basis for evidence. He was put to the impossible burden of examining all his relationships and associations over 14 years. How could he possibly prepare to defend against the myriad of events in a man's life which might be brought within that nebulous charge? How many records could he search to contradict improper interpretations of all of these experiences? How many witnesses would he need to obtain to refute the possible adverse evidence. "Associations" could include meetings, conversations, or other activities. These could have proper or improper inferences or connotations depending on who was there, who said what, under what circumstances did the event take place. How could Petitioner know how to refute unfair or unjustified improper inferences. If he had been advised of specific events he would have had the opportunity to explain away any

adverse implications, or provide witnesses to contradict any adverse inferences. Some of the events upon which the Court of Appeals relied illustrate the unfair burden:

(1) In 1983 during his father-in-law's trial Petitioner's car, and a car belonging to a union organizer, were observed parked outside his father-in-law's house during business hours. (at Appendix A9). Was he there or was it his wife? If he was there, was the purpose completely innocent and proper? Was the business Agent there? If so for what purpose? If Petitioner had known by the charge that this isolated event would be singled out of the myriad of associations, he could have had his wife and the union agent help him recall what in fact took place on a day nine years before his hearing.

(2) He visited his father-in-law in prison and spoke to him on the telephone several times (at Appendix A 9). Had this been a specific charge he could have searched his memory and that of his family to recall who went with him and what was the purpose of the visits and telephone calls. (Moretina went to prison in 1983 and was still confined at the time of the hearing in 1992. These limited familial contacts could create no inference of improper conduct.)

G. The Non-specific Charge Was Not Cured By Post Hearing Submissions or the Right to Request a Continuance.

We know of no authority for the position that the right of post-hearing submissions or the right to request a continuance cures a defective charge.

892 pages of exhibits were received in evidence subject only to the post-hearing right of Petitioner's counsel to object. At the hearing he did not know what specific evidence was relied on or what evidence he needed to refute the charge. After hearing he still did not have even an inkling as to what facts and events he must respond to. More importantly, the hearing having closed, he had no further opportunity to present evidence.

The right to request a continuance of the hearing did in no way cure the problems presented by the lack of specificity of the charge. No amount of time allowed would have permitted a detailed examination of the mass of materials, investigation of the myriad of names and events contained therein and to locate and question the innumerable potential witnesses disclosed. Nor should the accused be compelled to do so.

H. Purpose of Specificity Requirement.

The purpose of a specific charge is to fully inform the person charged with sufficient particularity of matters necessary to prepare his defense. While the degree of specificity may be less than that required in criminal cases, the purposes are the same. They include clarification of the charges, prevention of undue labor in the defendant's preparation for trial, facilitation of the defendant's preparation for trial, avoidance of surprise and limitation of the scope of the prosecution. These are essential elements of procedural due process, required so that the accused can prepare a defense and have a "full and fair hearing."

The duties of a defense attorney require him to try to determine exactly what his client is charged with and the facts, circumstances, times and places of events. Within that narrowed scope he can question his client, seek other witnesses, obtain supporting documentary evidence and research the relevant legal authorities. In other types of legal proceedings he does this by depositions, interrogatories, requests for admissions, motions for more definite statements or bill of particulars, motions to dismiss and motions in limine. None of these methods of preparing a defense were available here. Without a specific charge and without any of the tools which a defense counsel can normally employ to prepare a defense, the right of counsel and the right of a fair hearing become meaningless words.

II

DENIAL OF PRE-HEARING PROCEDURES ALSO DENIED PETITIONER A FULL AND FAIR HEARING.

A. Pre-hearing Procedures Denied.

The procedural rules followed in hearings under the Consent Decree do nothing to alleviate the deficiencies in the charge. They provide none of the traditional methods by which an accused is provided the tools to prepare his defense. We do not argue here that all such procedural rights are required in administrative hearings but the absence of any such rights makes the requirement of specificity of the charge even more essential.

Prior to hearing Petitioner's counsel requested:

(1) That the charge be limited to associations with the six persons named in the charge.

(2) That the charge be made specific as to dates or periods of time of the alleged associations.

(3) That the evidence be limited to those portions of the exhibits upon which the Investigations Officer relied.

(4) That the Investigations Officer produce for inspection all documents and other evidence to be used against Petitioner.

(5) That Petitioner be provided a list of witnesses whom the Investigations Officer intended to call.

All requests were denied except for the production of exhibits. The Administrator held that the Consent Decree does not give the union member any right to pre-hearing discovery, citing *United States v. IBT*, 764 F.Supp. 797, 800 (S.D.N.Y. 1991) and that there is no right to the names of witnesses or a Bill of Particulars, citing *United States v. IBT*, 745 F.Supp. 908, 914 (S.D.N.Y. 1990).

Nor do the hearing rules under the Consent Decree permit interrogatories, depositions, requests for admissions, motions in limine, or other traditional methods for preparing a defense.

On the other hand a union member is compelled under the Consent Decree to give an open-ended exploratory sworn statement to the Investigations Officer, prior to the filing of the charge. The refusal to do so is itself the basis for disciplinary action.

B. Harmful Effects of Refusal To Limit Evidence

The Administrator received in evidence exhibits totaling 892 pages, provided Petitioner a few days before the hearing. The massive amount of documents provided did not clarify the charge but to the contrary made preparation of his defense more formidable. They were a lengthy chronicle of the activities of innumerable alleged members of organized crime and other events extending back years prior to Petitioner's union membership. Very few of them referred to the events and persons upon which the ultimate findings were made.

In his 210 page sworn testimony before the Investigations Officer he was questioned about his relationship with 69 persons. This prolixity was replicated through the remaining 682 pages of exhibits, which dealt with literally hundreds of persons and events including some which were prior to the 14 years of Petitioner's union membership.

The effect of the Administrator's ruling permitting the receipt in evidence of the mass of materials permitted the Administrator and the courts to pour over the myriad of documents to find isolated incidents upon which to base findings as to persons and events, as to which Petitioner had no warning.

III

RELEVANT PROVISIONS OF UNION CONSTITUTION ARE IMPERMISSIBLY VAGUE AND OVERBROAD.

The provisions of the IBT constitution are themselves void under LMRDA *as applied to Petitioner,* in that they are vague and overbroad and therefore fail to give adequate notice of the conduct prohibited. It lists grounds for disciplinary charges, including; "Knowingly associating (as that term has been defined in prior decisions and disciplinary charges under this Article), with any member or associate of any organized crime family or any other criminal group." It further provides that all members shall conduct themselves "at all times in such a manner as not to bring reproach upon the Union."

The Court of Appeals held (at Appendix A 15) that "Even assuming the existence of hypothetical situations in which the prohibitions would be considered vague, however, DiGirlamo's is not such a case. We have held that 'it should have been clear to [union members disciplined for associating with LCN] that association with known members of organized crime would bring reproach upon the IBT.' " But this does not answer the essential questions. Petitioner is charged with "bringing reproach upon the union by knowing association with members of an organized crime family." He is left to speculate as to what is the proscribed activity. What does "reproachful conduct" include? What knowledge is required for "knowing association?" What acts constitute proscribed "association?" Does the constitution forbid "innocent" association? (or can it?) Can it punish activities unrelated to union activities?

Union disciplinary proceedings based on vague and uncertain provisions in the union constitution have been held repugnant to traditional concepts of due process. *Semancik v. United Mine Workers Local*, 466 F.2d 144, 157 (3rd Cir. 1972):

> Requiring unions to limit their prosecutions to constitutional provisions and by-laws which reasonably inform union members of the nature of the proscribed activity is a logical extension of the requirement of a full and fair hearing in accordance with due process. . . . A requirement of specific charges serves little purpose when judged against vague, ill-defined union by-laws. . . . This lack of a standard of conduct also makes it difficult, if not impossible, for a union member to be adequately apprised of the charges against him in order to prepare his defense. Therefore, any such prosecution fails to meet the specifically prescribed minimum due process requirements set forth in Section 101(a)(5)."

The prohibitions of the union constitution cannot include the innocent associations of DiGirlamo in activities unrelated to union affairs. Nothing in the language of the union constitution would put a reasonably intelligent member on notice that innocent associations with relatives or legitimate professional activities would result in his expulsion.

A. No Reproachful Conduct.

The provision that the conduct "bring reproach upon the union" as fairly construed, limits the impermissable conduct to misconduct relating to the union. DiGirlamo's

unpublicized legitimate professional or familial associations unrelated to union affairs and involving no misconduct on his part are not activities which might bring reproach on the union.

The purpose of the Consent Decree was to eliminate "corruption of any part of the IBT" and to insure that it be maintained "without unlawful outside influence". There was no evidence that the associations of Petitioner involved either corruption of the IBT or unlawful outside influence. None of the "associations" found by the Court of Appeals involved any misconduct by Petitioner during his 14 year union membership. Nor was there any evidence that the criminal acts of those he associated with involved corruption of the union.

In *Semancik*, supra, 466 F.2d at 159, the court said "that labor organizations properly exercise their disciplinary power only over a limited area of proscribed conduct inimical to the union as an entity" There must be a nexus between the conduct and the interests of the union. In *International Brotherhood of Boilermakers v. Braswell*, 388 F. 2d 193, 199 (5th Cir. 1968) the court found that Braswell's assault against a business agent was motivated with the purpose of preventing an officer from "properly discharging the duties of his office" and did not violate the provisions of the union constitution directed at the effective carrying out of union aims.

Allen v. International Alliance of Theatrical Stage Employees, 338 F.2d 309 (5 Cir. 1964) held "In determining whether discipline was properly imposed. . . . any ambiguity or uncertainty in the constitution must be construed

against the union and in favor of the member, in accordance with well established principles of documentary construction."

The IBT constitution must be read to limit proscribed conduct to that inimical to the union. To bring reproach, the association must bear some relation to union activities. None such exists here.

Civil Service cases require a rational connection between the dismissal of an employee and the statutory standard of "promoting the efficiency of the service." See *Hoska v. Dept. of Army*, 677 F. 2d 131, 137 (1982). The agency must establish a vital nexus between the misconduct and the efficiency of the service. The required nexus may be greater where the discharge is based on conduct that is not work-related (as here). *Hoska*, supra, at 144, n.22. The requirement of conduct affecting the "efficiency of the service" is comparable to the requirement of conduct such as to "bring reproach."

Webster's New Twentieth Century Dictionary defines "reproach" as "a source or cause of shame, disgrace, discredit or blame."

B. No Improper Associations

There was no evidence that any of the associations of Petitioner with alleged LCN members was for an improper purpose or that he was guilty of any misconduct during the fourteen years of his union membership or that the criminality of those persons he was found to have associated had any relation to corruption of the union.

The Court of Appeals held (at Appendix A11) that "knowing association" is not limited to associations for improper purposes. This holding conflicts with the decision of this Court in *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993) and decisions of other circuits.

Under the Consent Decree, "knowingly associating" has "the same meaning as that ascribed to that term in comparable federal proceedings."

(1) Comparable RICO Decisions

Since the Consent Decree was in a RICO action, decisions under RICO are "comparable federal proceedings" The term "association" under RICO has the connotation of active participation in unlawful activities.

Reves v. Ernst & Young, 113 S.Ct. 1163 (1993), held that accountants who performed audits did not "participate in operations or management," of the affairs of the enterprise as required to impose civil liability under RICO. They must have had some part in directing the enterprise's affairs. It was not sufficient that they participated in the operation or management of the Co-op itself but that they participated in the unlawful enterprise.

To establish a conspiracy to violate section 1962(c), the government must prove beyond a reasonable doubt that the individuals knowingly agreed to participate in the "enterprise" though a pattern of racketeering. *United States v. Riccobene*, 709 F.2d 214, 220-21 (3rd Cir.), cert. denied, ___U.S.___, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983). The proof must be individual and personal and the government must prove beyond a reasonable doubt that each

member of the conspiracy had the deliberate, knowing, and specific intent to join the conspiracy. Mere association with conspirators or knowledge of the illegal activity is not sufficient. *United States v. Falcone*, 1940, 311 U.S. 205, 210-11, 61 S.Ct. 204, 85 L.Ed. 128, *United States v. Miller*, 5 Cir., 1974, 500 F.2d 751, 764.

University of Maryland v. Peat, Marwick and Main, Co., 966 F.2d 1534 (3rd Cir. 1993) relying on *Reves*, held that the RICO statute cannot be used against an accounting firm which issued erroneous and misleading financial statements for a client, stating: "Under this test, not even action involving some degree of decision making constitutes participation in the affairs of an enterprise." There is a direct analogy. Petitioner did not participate in, or have any knowledge of, the unlawful activities of his brother-in-law's business. He simply did routine accounting work once a month and was not involved in any decision making. His involvement was even less than that of the accountants in *Reves* or *University of Maryland*.

(2) Other Comparable Federal "Association" Cases

Other decisions illustrate innocent associations as distinguished from improper associations. *Tyson v. N.Y. City Housing Authority*, 369 F.Supp. 513 (S.D. N.Y. 1974), held one could not be penalized for associating with his adult children who had committed criminal acts. *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1038 (C.A. 5, 1980) held an ordinance denying a liquor license on evidence of "connections with criminal elements" and "association, acquaintance, or business association with

undesirable parties," void for vagueness under the Fourteenth Amendment because "the nature of the improper associations or acquaintances is unspecified." In *Wilson v. Taylor*, 733 F.2d 1539 (C.A. 11, 1984) a police officer's association with a woman he was dating, the daughter of a convicted felon reputed to be a key organized crime figure, was held constitutionally protected, where there was no evidence that he acted under the influence of an organized crime leader.

(3) Parole Cases Are Not "Comparable".

The Court of Appeals' Opinion (Appendix A11-12) viewed the law governing restrictions on the activities of parolees as a comparable area as to the meaning of "association." The Opinion cites *United States v. Albanese*, 554 F.2d 543, 546 & n.6 (2d Cir. 1977) for the proposition that parole restrictions are violated by a calculated choice to associate with persons having a criminal record. One of the conditions of Albanese' probation was that he "associate only with law-abiding persons." The evidence was that on some 40 occasions in a three year period he was seen with one or more of seventeen individuals with criminal records, including two of his former codefendants (Id. at 545).

The parole cases do recognize some limitations on the vague restriction of "association." The court also cited *Birzon v. King*, 469 F. 2d 1241, 1243 (2d Cir. 1972). It states that "the term 'associated' . . . [means] something more than merely a fleeting or casual acquaintance." *Arciniega v. Freeman*, 404 U.S. 4 (per curium) (1971) stated "[T]he parole condition restricting association was [not]

intended to apply to incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer. Nor is such occupational association standing alone satisfactory evidence of nonbusiness association violative of the parole restriction."

Although cases involving parolees recognize limitations as to the meaning of forbidden associations and to that extent are supportive of Petitioner's position it should be recognized that convicted criminals have more limited rights than other persons and strictures on conditions of parole are justifiably more harsh than those on the conduct of a union member.

The broad discretion accorded the parole officer is inherent in some of the quite vague conditions such as the typical requirements that the parolee avoid "undesirable" associations or correspondence. Cf. *Arciniega v. Freeman*, 404 U.S. 4 (1971).

"To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrissey v. Brewer*, 408 U.S. 471, 478 (1971).

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1978) "[to] insure that the state-created parole system serves the public-interest purposes of rehabilitation and deterrence, the state may be specific or general in defining the conditions for release

and the factors that should be considered by the parole authority." Id. 442 U.S. at 8.

CONCLUSION

For these various reasons this petition for certiorari should be granted.

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

and

Charles M. Carberry, Esq., Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, et al., Defendants,

Nicholas A. DiGirlamo, Appellant.

No. 714, Docket 93-6194.

United States Court of Appeals,
Second Circuit.

Argued Jan. 31, 1994.

Decided March 24, 1994.

In review of disciplinary sanctions imposed on union member by Independent Administrator, pursuant to consent decree between United States and union which settled civil action under Racketeer Influenced and corrupt Organizations Act (RICO), the United States District Court for the Southern District of New York, David N. Edelstein, J., upheld sanctions. Union member appealed. The Court of Appeals, Feinberg, Circuit Judge, held that: (1) evidence was sufficient to support finding that union employee associated with organized crime figures and was subject to discipline; (2) union employee's associations with organized crime figures did not constitute "innocent familial or professional associations" so as not to be prohibited by consent decree; and (3) disciplinary

charges did not lack specificity so as to violate Labor-Management Reporting and Disclosure Act (LMRDA).

Affirmed.

Irving Achtenberg, Kansas City, MO (Achtenberg & Achtenberg, P.C., of Counsel), for appellant.

Celia A. Zahner, U.S. Investigations Office, New York City, for appellee.

Steven C. Bennett, New York City, Asst. U.S. Atty., S.D.N.Y. (Mary Jo White, U.S. Atty. S.D.N.Y., Gabriel W. Gorenstein, Asst. U.S. Atty., of Counsel), for plaintiff-appellee.

Before: FEINBERG, OAKES and KEARSE, Circuit Judges.

FEINBERG, Circuit Judge:

Nicholas A. DiGirlamo appeals from an order of the United States District Court for the Southern District of New York, David N. Edelstein, J., entered June 24, 1993. The order upheld disciplinary sanctions imposed upon DiGirlamo by the Independent Administrator of the International Brotherhood of Teamsters (IBT). We affirm.

I. Background

A. *The Consent Decree*

In 1988, the United States government filed a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, against the IBT, its General Executive Board (Board), the eighteen members of the Board, the Commission of La Cosa Nostra (LCN)

and individual members and associates of LCN. See *United States v. IBT*, 931 F.2d 177, 180 (2d Cir.1991). The government alleged that LCN, through a pattern of racketing activity, had infiltrated and come to dominate the IBT. The suit sought equitable relief to rid the union of LCN's corrupt influence.

IN 1989, the government's claims against the IBT, the Board, and the Board members were settled by means of a Consent Decree, which instituted a wholesale reform of the IBT's electoral and disciplinary processes. Id. at 180-81. The Consent Decree prohibits IBT members from "knowling associating" with members or associates of organized crime groups. The Consent Decree also provides for the appointment of an Investigations Officer to investigate corruption and misconduct within the union and an Independent Administrator (Administrator) whose duties include hearing and deciding union disciplinary charges. The Administrator's decisions in disciplinary cases are subject to review in the district court.

B. *The Decisions of the Administrator and the District Court*

In May 1992, the Investigations Officer brought disciplinary charges against DiGirlamo, then a member and employee of IBT Local 41 in Kansas City, Missouri.[1] The

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[1] The charge against DiGirlamo read as follows:

While a member and employee of IBT Local 41, you brought reproach upon the IBT and violated your membership oath in violation of Article II, Section 2(a) and Article XIX, Section 7(b)(1) and (2) of the IBT Constitution, *to wit*:

charges were that DiGirlamo had knowingly associated with members of LCN including, but not limited to, Peter Joseph Simone, Frank Anthony Tousa, Charles Moretina, and James J. Moretina, and with associates of LCN including, but not limited to, John Anthony Costanza and Nicholas Joseph LaBruzzo. Charles Moretina and James Moretina are DiGirlamo's father-in-law and brother-in-law, respectively. By knowingly associating with these organized crime figures. the Investigations Officer charged, DiGirlamo had brought reproach upon the IBT in violation of his IBT membership oath. Under § 7(b) of the IBT Constitution, violation of the membership oath is grounds for disciplinary action.

As required by the Consent Decree, a hearing was held before the Administrator. At the hearing, the case against DiGirlamo was based upon the declaration of FBI Agent Cullen Scott, which incorporated evidence linking DiGirlamo to the four LCN members named above and to other LCN members and associates.

In January 1993, the Administrator found that the Investigations Officer proved by a preponderance of the evidence that DiGirlamo had knowingly associated with LCN members Charles Moretina, Peter Simone, James Moretina, and Frank Anthony Tousa. The Administrator

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From 1978 to the present, while a member and employee of IBT Local 41, you knowingly associated with members of La Cosa Nostra ("LCN"), including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone, and Frank Anthony Tousa. From 1978 to the present, you also knowingly associated with associates of LCN including, but not limited to, John Anthony Costanza and Nicholas Joseph LaBruzzo.

rejected the FBI's identification of Costanza and LaBruzzo as LCN members. The Administrator ordered DiGirlamo permanently and immediately barred from the IBT. In June 1993, Judge Edelstein filed an Opinion and Order affirming the Administrator's decision. DiGirlamo appeals from that order.

II. Discussion

A. *Standard of review*

This court has not articulated the precise standard to be used by us in reviewing a district court order, which itself reviewed disciplinary action by the Administrator under the Consent Decree. The parties to the Consent Decree expressly adopted an extremely deferential standard of review from decisions of the Administrator. Paragraph 12(A) of the Consent Decree states that the Administrator shall preside at disciplinary hearings "conducted under the rules and procedures generally applicable to labor arbitration hearings" and shall "decide such cases using a 'just cause' standard." In addition, that paragraph states that "[a]ny decision of the Administrator shall be final and binding," subject to the review of the district court. *United States v. IBT*, (Friedman & Hughes), 905 F.2d 610, 616 (2d Cir.1990). The district court is to review decisions of the Administrator under "the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act [APA]."[2] We have held that the effect of these

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[2] That standard of review requires a reviewing court to hold unlawful and set aside agency action, findings and conclusions found to be –

provisions is to require the district court to treat decisions of the Administrator with "great deference." Id. at 616-17. We find that under any reasonable standard of review of the district court's order, it should be sustained.

B. *Sufficiency of the evidence*

DiGirlamo argues that the Administrator's decision was unsupported by "substantial evidence" as required by the standard of review derived from the APA. "Substantial evidence is more than a mere scintilla." *United States v. IBT* (Cimino), 964 F.2d 1308, 1311-12 (2d Cir.1992). It is, however, "something less than the weight of the evidence," and the substantial evidence standard may be met despite "the possibility of drawing two inconsistent conclusions from the evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966). The district court correctly

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(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence . . . ; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

* * *

5 U.S.C. § 706.

found that the evidence adduced at the hearing met this standard.

We hold that the evidence introduced at the hearing supported the Administrator's findings that DiGirlamo knowingly associated with LCN members Charles Moretina, James Moretina, Peter Simone, and Frank Anthony Tousa. We summarize the evidence connecting DiGirlamo to each of the four named LCN members. We emphasize that the summary by no means includes all of the relevant evidence. While certain facts may appear insignificant when viewed in isolation, the body of evidence as a whole clearly established a long-term pattern of association with LCN.

1. James Moretina

Confidential sources have identified James Moretina as an LCN member. In 1992, he pleaded guilty to money laundering in connection with an illegal gambling business.

With James Moretina's help, DiGirlamo found a job on the loading dock of a freight company when he joined the IBT in 1978 or 1979. In 1980, DiGirlamo obtained James Moretina's assistance in getting a job as accountant for IBT Local 41 in Kansas City.

In 1985, DiGirlamo was fired from Local 41. James Moretina, who was president of the "Be Amused" vending machine company, hired DiGirlamo to do bookkeeping work for the company. DiGirlamo continued to do bookkeeping for Be Amused even after returning to his job at Local 41 in 1987. In 1990, the FBI confiscated illegal

video poker machines from Be Amused and seized the company's books. In 1991, DiGirlamo testified about the company before a grand jury. In July 1991, James Moretina and Simone were arrested for laundering illegal gambling money through Be Amused. Despite these developments, DiGirlamo continued to work for the company until as late as March 1992.

DiGirlamo admitted that James Moretina often telephoned him at Local 41 and the two had a "comfortable amount" of telephone conversation. In a telephone call recorded in 1990, DiGirlamo and James Moretina discussed how to get a dentist on a list for referrals from Local 41. In a separate conversation, the men discussed rivalries within the union in relation to an upcoming union election.

2. Charles Moretina

DiGirlamo concedes Charles Moretina's underworld ties. In 1980, Harvey Bonadonna, participant in the Federal Witness Protection Program and son of a deceased LCN member, identified Charles Moretina as an LCN member and "killer or murderer for the [Carl] 'Tuffy' DeLuna group." Newspaper articles introduced at DiGirlamo's hearing also linked Moretina to organized crime. In 1981, Moretina was indicted, along with Kansas City LCN underboss Carl Civella and other defendants, in connection with a conspiracy to skim proceeds from a Las Vegas casino. *United States v. DeLuna*, 763 F.2d 897, 904 (8th Cir.), cert. denied sub nom. *Thomas v. United States*, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985).

Moretina was eventually convicted on charges of conspiracy and interstate transportation of stolen property, Id.

Before Charles Moretina's conviction in 1983, DiGirlamo saw him "[o]ne, two times, maybe more" each month. In 1982 or 1983, John Couts, an officer of Local 41, accused DiGirlamo of "putting the make" on his daughter and fired him. DiGirlamo told Moretina about the incident. When DiGirlamo later encountered Couts, Couts cried, asked for forgiveness, and rehired him.

In 1983, DiGirlamo attended Charles Moretina's trial. During the trial, DiGirlamo's car, and a car belonging to a union organizer, Tom Nabors, were observed parked outside Moretina's home during business hours. After Moretina's conviction, DiGirlamo remained in contact with him. DiGirlamo traveled to Milan, Michigan twice to visit Moretina in prison and has spoken to him on the phone several times.

3. Peter Simone

Confidential sources have identified Peter Simone as a "made" member of LCN. Harvey Bonadonna identified Simone as an LCN member in charge of illegal casinos in Kansas City. Newspaper reports introduced at DiGirlamo's hearing identified Simone as an LCN "underboss." Simone was convicted on gambling conspiracy charges in 1976 and on charges of operating an illegal casino in 1992. In 1988, the Senate Permanent Subcommittee on Investigations found Simone to be a "capo" (a supervisor or "street boss") of LCN.

In 1975, prior to joining the IBT, DiGirlamo was indicted, along with Simone, Tousa, and several LCN associates, on charges of operating a gambling business. DeGirlamo eventually pleaded guilty to one count of conspiracy to operate a gambling game in 1977. Although he was aware that his co-conspirators were allegedly involved in organized crime, he continued to associate with them.

DiGirlamo and Simone have known each other since they attended grade school together. After their convictions on the gambling charges, they played together in sports leagues. James Moretina sometimes asked DiGirlamo to pick up the Be Amused books at a Kansas City social club owned by Simone. Simone would sometimes call DiGirlamo at Local 41 to tell him to pick up the books. DiGirlamo admitted that he had heard the club described as a "casino" and that he saw people playing cards there. Simone later pleaded guilty to operating an illegal casino at the club.

4. Frank Anthony Tousa

Based on its organized crime investigations, the FBI considers Frank Anthony Tousa to be a member of LCN. In 1976, Tousa was convicted of conspiracy to operate an illegal gambling business. In 1980, Harvey Bonadonna described Tousa as the Kansas City LCN's "Las Vegas connection" in charge of football betting. Newspaper accounts introduced at DiGirlamo's hearing linked Tousa to LCN. DiGirlamo testified that he had been to Tousa's home in 1986 or 1987 and that he had prepared a tax return for Tousa and his wife in 1985 or 1986.

In light of the foregoing, it is indisputable that substantial evidence supported the Administrator's finding that DiGirlamo had "extensive involvement" with the Moretinas, Simone, and Tousa. In view of substantial newspaper coverage, as well as DiGirlamo's regular contact with the four men over many years, the Administrator was justified in inferring that DiGirlamo must have known of their ties to organized crime. Cf. *United States v. IBT* (Cozza), 764 F.Supp. 797, 801-02 (S.D.N.Y.1991), aff'd, 956 F.2d 1161 (2d Cir.1992).

C. *Prohibited Association*

DiGirlamo insists, however, that his associations with these LCN members constituted only "innocent familial or professional associations" and were not prohibited by the Consent Decree. DiGirlamo contends that the Consent Decree prohibits only association for improper purposes. We disagree.

An association with an LCN member "beyond that required in [one's] official capacity" may constitute knowing association. *United States v. IBT* (Adelstein), 998 F.2d 120, 126 (2d Cir.1993). Under the Consent Decree, "knowingly associating" has "the same meaning as that ascribed to that term in comparable federal proceedings or federal rules and regulations." We have held that one such comparable area of law is that governing restrictions on parolees' activities. Id. at 125. While restrictions on parolees' association with persons having criminal records do not prohibit "a fleeting or casual acquaintance," *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir.1972), the restrictions are not limited only to associations that

involved improper activity. Such restrictions are violated by a "calculated choice" to associate with persons having a criminal record. *United States v. Albanese*, 554 F.2d 543, 546 & n. 6 (2d Cir.1977).

DiGirlamo's contacts with LCN members clearly constituted conscious choices. The fact that DiGirlamo was married to Charles Moretina's daughter might constitute an innocent familial explanation for some of his contacts with the Moretinas: for example DiGirlamo's trips, with his wife and children, to visit her father in prison. But even if family ties can excuse association with organized crime figures, family ties do not fully explain DiGirlamo's relationship with the Moretinas. DiGirlamo often spoke with the Moretinas about union-related matters. For example, he discussed a union election and dentist referrals by the union with James Moretina and discussed his dismissal by Couts with Charles Moretina. DiGirlamo once went unaccompanied by his wife to visit Charles Moretina in the federal penitentiary in Michigan.

Furthermore, family ties cannot in this context justify DiGirlamo's contacts with Tousa and Simone or his bookkeeping work for James Moretina's Be Amused company. DiGirlamo calls these ties "innocent" professional associations. In the parole context, it has been held that restrictions on association allow "incidental contacts . . . in the course of work on a legitimate job for a common employer." *Arciniega v. Freeman*, 404 U.S. 4, 4, 92 S.Ct. 22, 22, 40 L.Ed.2d 136 (per curiam) (1971). But DiGirlamo's "professional" associations were much more significant. He did bookkeeping for a business run by James Moretina – a business that was involved in illegal gambling operations. He picked up the books for this job

at Simone's illegal gambling club. He also prepared tax returns for Tousa. In addition to his non-union business contacts with Tousa and Simone, DiGirlamo had social contact with them as well.

The above is sufficient to demonstrate that DiGirlamo engaged in prohibited association, even if the association was not for an improper purpose. Without relying on other evidence for our decision, however, it should be noted, for purposes of portraying a complete picture, that some evidence further suggested that DiGirlamo not only associated with organized crime figures, but that he may also have served as an instrument of LCN influence on Local 41. As noted above, it was James Moretina who assisted DiGirlamo in joining the union and becoming its bookkeeper in 1980. A confidential informant stated that LCN member Carl Civella, who controlled hiring at Local 41, as "instrumental" in the hiring of DiGirlamo. In 1981 and 1982, James Moretina, Civella's girlfriend Rita Armilio, and LCN member Carl DeLuna's stepson Rick DeLuna were hired to work at Local 41. DiGirlamo's firing in 1985 coincided with the firings of James Moretina, Armilio and DeLuna. FBI Agent Scott attributed the purge to a "bad relationship" between the Civella organization and Local 41 president John Couts. A few months after Couts's death in 1987, Dan Johnson, Local 41's new president, rehired DiGirlamo. In 1990, a confidential FBI informant stated that LCN used DiGirlamo to keep apprised of Local 41's financial status so that Johnson could not cite lack of funds as grounds for refusing to follow LCN orders.

D. *LMRDA provisions*

DiGirlamo argues that, as applied to his case, both the IBT constitution and the Investigations Officer's disciplinary charges against him violate the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401 et seq. Under the LMRDA, a labor organization is prohibited from disciplining one of its members unless the member has been "(A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." 29 U.S.C. § 411(a)(5).

DiGirlamo argues that the charge against him, as well as the provisions of the IBT constitution prohibiting "knowing association," lacked the specificity required by the LMRDA.[3] He further argues that both the prohibition on brining "reproach" upon the union are impermissibly vague as applied to his conduct. He claims that the language of the provisions is insufficient to put a reasonably intelligent union member on notice that associations such as DiGirlamo's would result in disciplinary action. We agree with the district court that these arguments are without merit.

The LMRDA does not require of disciplinary charges the level of specificity required in criminal prosecutions.

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[3] The district court addressed these arguments despite its finding that DiGirlamo had failed to properly raise them before either the district court or the Administrator. DiGirlamo has failed to show otherwise. Nonetheless, since the district did deal with these arguments, and because they raise serious issues, we address them here.

Berg v. Watson, 417 F.Supp. 806, 810 (S.D.N.Y.1976). Furthermore, we have held that IBT members were aware that association with organized crime figures was prohibited even *before* the Consent Decree added the provision to the union constitution. *United States v. IBT* (Senese & Talerico), 941 F.2d 1292, 1297 (2d Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1161, 117 L.Ed.2d 408 (1992). The new provision "simply made explicit the longstanding goal of the IBT to be free of corruption." Id. Even assuming the existence of hypothetical situations in which the prohibitions would be considered vague, however, DiGirlamo's is not such a case. We have held that "it should have been clear to [union members disciplined for associating with LCN] that associating with known members of organized crime would bring reproach upon the IBT. . . . " Id. at 1298.

DiGirlamo also argues that he was denied a reasonable amount of time to prepare his defense at the disciplinary hearing before the Administrator. Specifically, he alleges that his counsel first gained access to hundreds of pages of evidence to be used against him only days before the hearing. Although DiGirlamo had unsuccessfully moved for a bill of particulars before the hearing, he did not raise the argument of insufficient time to prepare at the hearing; nor did he move for adjournment or continuation of the hearing in order to prepare further. Finally, the Administrator offered DiGirlamo the usual opportunity to file post-hearing submissions.

DiGirlamo further argues that the sanctions against him violate the guarantee of free speech and association of § 101(a)(2) of the LMRDA (codified at 29 U.S.C. § 411(a)(2)). This argument is entirely meritless. "The

IBT's sanctioning members in order to rid itself of corrupt influence conforms with § 101(a)(2) of the LMRDA, and infringes no First Amendment rights." Senese & Talerico, 745 F.Supp. 908, 913 (S.D.N.Y.1990), aff'd, 941 F.2d 1292 (2d Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1161, 117 L.Ed.2d 408 (1992).

E. *Hearsay*

DiGirlamo also takes issue with the admission of hearsay evidence at his hearing. In IBT disciplinary proceedings, as in administrative proceedings, evidentiary rules are relaxed. *Adelstein*, 998 F.2d at 124. Thus hearsay is admissible, provided it is reliable. Id. Hearsay statements may gain reliability by corroborating one another or by including specific details. Id. at 124-25.

DiGirlamo contends, however, that the hearsay admitted against him at the disciplinary hearing was unreliable. We disagree. Contrary to DiGirlamo's assertions, the declaration of FBI Agent Cullen Scott was not hearsay because DiGirlamo's counsel was able to cross-examine Agent Scott at the hearing. DiGirlamo maintains that the newspaper articles and Senate Reports attached as exhibits to the declaration were also unreliable hearsay. As the district court found, however, the hearsay statements admitted at the hearing corroborated each other or were corroborated by reliable independent sources.

We have considered all of appellant's arguments and find them to be without merit. The order of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of April on thousand nine hundred and ninety-four.

Present:

Hon. WILFRED FEINBERG

Hon. JAMES L. OAKES

Hon. AMALYA L. KEARSE

CIRCUIT JUDGES,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

CHARLES M. CARBERRY, ESQ.,

Appellee.

against

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO et al.,

Defendants,

NICHOLAS A. DIGIRLAMO,

Appellant.

Docket No. 93-6194

(Filed Apr. 22, 1994)

A petition for rehearing having been filed herein by Appellant NICHOLAS A. DIGIRLAMO

Upon consideration by the panel thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:

/s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of March, one thousand nine hundred and ninety-four.

Present:

HON. WILFRED FEINBERG

HON. JAMES L. OAKES

HON. AMALYA L. KEARSE

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- and -

CHARLES M. CARBERRY, ESQ.,

Appellee.

- against -

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO et al.,

Defendants,

NICHOLAS A. DIGIRLAMO,

Appellant.

Docket No. 93-6194

(Filed ????? 24, 1994)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcriprt [sic] of record from the United States District Court for the Southern District of New York and was argued by counsel.

On CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

GEORGE LANGE III, CLERK
By /s/ Carolyn Clark Campbell
Chief Deputy Clerk

GEORGE LANGE III, Clerk
By:

/s/ Edward J. Guardaro
Edward J. Guardaro
Staff Attorney
ISSUED AS MANDATE
5-2-94

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UNITED STATES of America, Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, et al., Defendants.

In re APPLICATION CVI OF the INDEPENDENT ADMINISTRATOR.

No. 88 Civ. 4486 (DNE).

United States District Court,
S.D. New York.

June 22, 1993.

Independent administrator appointed pursuant to consent decree designed to rid union of influence of organized crime applied for review of decision finding that bookkeeper from union local had brought reproach upon union by knowingly associating with members of organized crime, and imposing penalties upon bookkeeper, including permanent banishment from union. The District Court, Edelstein, J., held that: (1) decision was not arbitrary and capricious on ground that independent administrator considered hearsay evidence in reaching decision; (2) sufficient evidence supported finding that bookkeeper knowingly associated with individuals connected with organized crime; (3) evidence supported finding that bookkeeper's contacts with organized crime figures brought reproach upon union; (4) penalties of banishment and deprivation of employee benefits were not arbitrary and capricious; and (5) bookkeeper's application for stay of penalties pending appeal would be denied.

So ordered.

Charles M. Carberry, Investigations Officer of Intern. Broth. of Teamsters (Celia A. Zahner, of counsel), for defendants.

Mary Jo White, U.S. Atty., S.D.N.Y. (Christine H. Chung, Asst. U.S. Atty., of counsel), for U.S.

Achtenberg & Achtenberg, P.C., Kansas City, MO (Irving Achtenberg, of counsel) for respondent Nicholas A. DiGirlamo.

OPINION & ORDER

EDELSTEIN, District Judge:

This opinion emanates from the voluntary settlement of an action commenced by plaintiff United States of America (the "Government") against defendants International Brotherhood of Teamsters (the "IBT" or the "Union") and the IBT's General Executive Board (the "GEB") embodied in the voluntary consent order entered March 14, 1989 (the "Consent Decree"). The Consent Decree provides for three Court-appointed officials: the Independent Administrator to oversee the Consent Decree's remedial provisions, the Investigations Officer to bring charges against corrupt IBT members, and the Election Officer who supervised the electoral process that culminated in the 1991 election for International Officers. The goal of the Consent Decree is to rid the IBT of the influence of organized crime through the election and disciplinary provisions.

Application CVI presents for this Court's review the decision of the Independent Administrator finding that the Investigations Officer had proven that Nicholas A.

DiGirlamo, bookkeeper for IBT Local 41 in Kansas City, Missouri and for IBT Joint Council 56, brought reproach upon the IBT by knowingly associating with members of the Kansas City La Cosa Nostra ("LCN").

BACKGROUND

The Investigations Officer alleged that Mr. DiGirlamo violated Article II, Section 2(a) and Article XIX, Section 7(b) of the IBT Constitution by knowingly associating with Charles Moretina ("C. Moretina"), James Moretina ("J. Moretina"), Peter Joseph Simone ("Simone") and Frank Anthony Tousa ("Tousa"), members of La Cosa Nostra. Article II, Section 2(a) is the IBT membership oath, which provides in relevant part that every IBT member shall "conduct himself or herself in a manner so as not to bring reproach upon the Union." Article XIX, Section 7(b) is a non-exhaustive list of disciplinary charges that may be filed against IBT members. Charges listed thereunder include violation of the IBT membership oath or the IBT Constitution, and knowing association with a member of a criminal organization. *See* Article XIX, §§ 7(b)(1), (2), (9).

Pursuant to paragraph F.12(C) of the Consent Decree, the Independent Administrator must decide disciplinary hearings using a "just cause" standard. The Investigations Officer has the burden of establishing just cause by a preponderance of the evidence. December 27, 1990 Opinion & Order, 754 F.Supp. 333, 337 (S.D.N.Y.1990). After receiving briefs from the parties to this action and conducting a hearing at which Mr. DiGirlamo was represented by counsel, the Independent Administrator issued

a twenty-four page decision. The Independent Administrator found that the Investigations Officer had sustained his burden of proving that Mr. DiGirlamo had "knowling associated" with C. Moretina, J. Moretina, Simone and Tousa.

As a penalty for this conduct, the Independent Administrator permanently banished Mr. DiGirlamo from the IBT, stating that "[a]n individual like DiGirlamo, who counts among his associates members of organized crime, has no place in the IBT." Ind.Admin.Dec. at 22. Furthermore, the Independent Administrator exercised his authority to impose sanctions upon Mr. DiGirlamo's employee benefits.[1] *See* December 28, 1990 Memorandum & Order, 753 F.Supp. 1181 (S.D.N.Y.1990), *aff'd*, 941 F.2d 1292 (2d Cir.), *cert denied*, ___ U.S. ___, 112 S.Ct. 76, 116 L.Ed.2d 50 (1991). The Independent Administrator prohibited the IBT or any affiliate from contributing funds on Mr. DiGirlamo's behalf to any third-party plan of which Mr. DiGirlamo is a member.[2] Moreover, the Independent Administrator directed that the IBT or IBT-affiliated entities not make payment of any benefits to Mr. DiGirlamo. This prohibition includes such items as bonuses, local-controlled severance plans or similar payments. Finally, the Independent Administrator prohibited the IBT and

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[1] Consistent with prior rulings in this case, the Independent Administrator did not alienate Respondent's vested benefits.

[2] Because Mr. DiGirlamo refused to submit to the Independent Administrator a schedule of his benefits or a memorandum on the issues raised in imposing sanctions touching upon those benefits, *see* Ind.Admin.Dec. at 23, this prohibition is couched in general terms.

IBT-affiliated entities from contributing to Mr. DiGirlamo's legal expenses in connection with the instant disciplinary action.

Mr. DiGirlamo appeals to this Court the decision of the Independent Administrator. In addition, Mr. DiGirlamo requests that this Court stay imposition of the penalties imposed by the Independent Administrator. This Court finds that the opinion of the Independent Administrator is fully supported by the evidence, and that Mr. DiGirlamo's arguments are devoid of merit. Accordingly, the opinion of the Independent Administrator is affirmed in its entirety. Furthermore, because Mr. DiGirlamo has failed to demonstrate that a stay of the imposition of penalties is appropriate, no stay will issue.

DISCUSSION

In reviewing decisions of the Independent Administrator, it is well settled that the findings of the Independent Administrator "are entitled to great deference." *United States v. IBT*, 905 F.2d 610, 616 (2d Cir.1990), *aff'g* March 13, 1990 Opinion & Order, 743 F.Supp. 155 (S.D.N.Y.1990). This Court will overturn the findings of the Independent Administrator when it determines that they are, on the basis of all the evidence, "arbitrary or capricious." *United States v. IBT*, 964 F.2d 1308, 1311-12 (2d Cir.1992); August 27, 1990 Opinion & Order, 745 F.Supp. 908, 911 (S.D.N.Y.1990), *aff'd*, 941 F.2d 1292 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 76, 116 L.Ed.2d 50 (1991); March 13, 1990 Opinion & Order, 743 F.Supp. 155, 165 (S.D.N.Y.1990), *aff'd*, 905 F.2d 610 (2d Cir.1990); *see* July 14, 1992 Opinion & Order, 803 F.Supp. 748, 754

(S.D.N.Y.1992); July 13, 1992 Opinion & Order, 803 F.Supp. 740, 745-46 (S.D.N.Y.1992); July 9, 1992 Opinion & Order, 803 F.Supp. 734, 737-38 (S.D.N.Y.1992); May 15, 1992 Opinion & Order, 792 F.Supp. 1346, 1352 (S.D.N.Y.1992); April 27, 1992 Memorandum & Order, 791 F.Supp. 421, 425 (S.D.N.Y.1992); February 11, 1992 Memorandum & Order, 787 F. Supp. 345, 350 (S.D.N.Y.1992); January 20, 1992 Memorandum & Order, 782 F.Supp. 256, 259 (S.D.N.Y.1992); January 16, 1992 Memorandum & Order, 782 F. Supp. 238, 241 (S.D.N.Y.1992); November 8, 1991 Memorandum & Order, *slip op.*, at 405, 1991 WL 243268 (S.D.N.Y.1991); October 29, 1991 Opinion & Order, 776 F.Supp. 144, 152-53 (S.D.N.Y1991), *aff'd*, 954 F.2d 801 (2d Cir.1992), *cert. denied*, ___ U.S. ___, 112, S.Ct. 2993, 120 L.Ed.2d 870 (1992); October 25, 1991. Order. *slip op.*, at 4-5 (S.D.N.Y.1991); October 24, 1991 Memorandum & Order, 777 F.Supp. 1133, 1136 (S.D.N.Y.1991); October 16, 1991 Memorandum & Order, 777 F.Supp. 1130, 1132 (S.D.N.Y.1991), *aff'd*, 964 F.2d 1308 (2d Cir.1992); October 11, 1991 Memorandum & Order, 777 F.Supp. 1127, 1128 (S.D.N.Y.1991), *aff'd*, 956 F.2d 1161 (2d Cir.1992); October 9, 1991 Memorandum & Order, 777 F.Supp. 1123, 1125 (S.D.N.Y.1991); August 14, 1991 Memorandum & Order, *slip op.* at 4 1991 WL 161084 (S.D.N.Y.1991); July 31, 1991 Memorandum & Order, *slip op.*, at 3-4, 1991 WL 150226 (S.D.N.Y.1991), *aff'd*, 956 F.2d 1161 (2d Cir.1992); July 18, 1991 Memorandum & Order, *slip op.*, at 3-4, 1991 WL 136030 (S.D.N.Y.1991), *aff'd*, 956 F.2d 1161 (2d Cir.1992); July 16, 1991 Opinion & Order, *slip op.*, at 3-4, 1991 WL 136029 (S.D.N.Y.1991); June 6, 1991 Opinion & Order, 775 F.Supp. 90, 93 (S.D.N.Y.1991), *aff'd in relevant part*, 948 F.2d 1278 (2d Cir.1991); May 13, 1991 Memorandum &

Order, 764 F.Supp. 817, 820-21 (S.D.N.Y.1991); May 9, 1991 Memorandum & Order, 764 F.Supp. 797, 800 (S.D.N.Y.1991) *aff'd*, 956 F.2d 1161 (2d Cir.1992); May 6, 1991 Opinion & Order, 764 F.Supp. 787, 789 (S.D.N.Y.), *aff'd*, 940 F.2d 648 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 76, 116 L.Ed.2d 50 (1991); December 27, 1990 Opinion & Order, 754 F.Supp. 333, 337 (S.D.N.Y.1990); September 18, 1990 Opinion & Order, 745 F.Supp. 189, 191-92 (S.D.N.Y.1990); January 17, 1990 Opinion & Order, 728 F.Supp. 1032, 1045-57, *aff'd*, 907 F.2d 277 (2d Cir.1990).

1. *Admissions of Hearsay Statements*

Mr. DiGirlamo argues that the Independent Administrator's decision was arbitrary and capricious because the Independent Administrator considered hearsay evidence in reaching his decision. However, it is beyond reasonable dispute that "hearsay evidence, if reliable, is admissible in IBT disciplinary proceedings." Oct. 16, 1991 Memorandum & Order, 777 F.Supp. 1130, 1133 (S.D.N.Y.1991) (*citing United States v. IBT*, 745 F.Supp. 908, 914-15 (S.D.N.Y.1990), *aff'd*, 941 F.2d 1292, 1297 (2d Cir.1991)). The Independent Administrator carefully considered the hearsay statements in the instant case and found them reliable in that they corroborated each other or were corroborated by independent and reliable sources. For example, while the Independent Administrator considered newspaper reports detailing various individuals' ties to organized crime, he did so only in those situations where several newspaper accounts corroborated each other *and* were corroborated by information

from other sources. Moreover, Mr. DiGirlamo characterizes certain testimony as hearsay – such as that of FBI Special Agent Scott, *see Brief of Nicholas A. DiGirlamo in Opposition to the Decision of the Independent Administrator* ("Brief in Opposition") at 10 – in spite of the fact that Special Agent Scott was available for cross-examination. After examining the hearsay evidence considered by the Independent Administrator, this Court finds that all such evidence considered was intrinsically reliable and was corroborated by independent and unrelated sources. Accordingly, this Court finds that the Independent Administrator's admission of hearsay statements does not render his decision arbitrary and capricious.

2. *Sufficient Evidence Supports the Independent Administrator's Finding That Respondent Knowingly Associated With Individuals Associated With the LCN*

Mr. DiGirlamo next argues that the Independent Administrator's decision was arbitrary and capricious because the evidence adduced at the disciplinary hearing did not show that Mr. DiGirlamo brought reproach on the union by knowingly associating with members of organized crime. Mr. DiGirlamo presents a two-pronged attack on the Independent Administrator's decision. First, Respondent avers that insufficient evidence was adduced to demonstrate that C. Moretina, J. Moretina, Simone and Tousa are members of La Cosa Nostra. Second, Mr. DiGirlamo contends that any association that he had with C. Moretina, J. Moretina, Simone and Tousa was innocent or familial and therefore did not rise to the level of prohibited "knowingly association." Respondent's argument is without merit. The evidence adduced at Mr.

DiGirlamo's hearing amply supports the Independent Administrator's finding that Mr. DiGirlamo knowingly associated with these organized crime figures.

Prohibited knowing association with an organized crime figure is established when contact is purposeful and not incidental or fleeting. *See* Aug. 27, 1990 Opinion & Order, 745 F.Supp. 908, 918 (S.D.N.Y.1990), *aff'd*, 941 F.2d 1292 (2d Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1161, 117 L.Ed.2d 408 (1992). Purposeful contacts are prohibited even if no illegal purpose is demonstrated. *See* April 27, 1992 Memorandum & Order, 791 F.Supp. 421 (S.D.N.Y.1992). Purposeful contacts may occur in either a business or a social setting. *See* Aug. 27, 1990 Opinion & Order, 745 F.Supp. 908 (S.D.N.Y.1990). An examination of the record demonstrates that the Independent Administrator was well within his discretion in finding that Mr. DiGirlamo brought reproach upon the Union by knowingly associating with C. Moretina, J. Moretina, Simone and Tousa in violation of Article II, Section 2(a) and Article XIX, Section 7(b) of the IBT Constitution.

A. *Charles Moretina, James J. Moretina, Peter Joseph Simone and Frank Anthony Tousa Are Members of the Kansas City LCN*

Evidence adduced in the course of Mr. DiGirlamo's disciplinary hearing before the Independent Administrator conclusively linked C Moretina, J. Moretina, Simone and Tousa to the Kansas City LCN. The testimony of FBI Special Agent Scott, and that of Fred Harvey Bonadonna, an FBI informant and a participant in the Federal Witness Protection Program, identified C. Moretina as a member

of organized crime. *See* Ind.Admin.Dec. at 8. Various newspaper accounts corroborated this testimony. *See id.* Moreover, C. Moretina was convicted, and is currently serving a 20-year sentence, in connection with a Las Vegas casino skimming operation. *See United States v. DeLuna*, 763 F.2d 897 (8th Cir.1985). Several of C. Moretina's co-defendants in that case were members of organized crime. *See id.* Indeed, as Mr. DiGirlamo admitted in a post-hearing submission to the Independent Administrator, "[t]here is, admittedly, evidence upon which the Independent Administrator could find that Charles Moretina was a member of organized crime." Ind.Admin.Dec. at 9.

Special Agent Scott further testified that James Moretina is a member of the Kansas City LCN. *See id.* at 10. J. Moretina's automobile was observed by law enforcement officials at the funeral of a known member of organized crime, *see id.*, and in 1992 he pled guilty to laundering illegal gambling proceeds. *See id.* Numerous FBI confidential informants confirmed that J. Moretina is a member of organized crime. *See id.*

Moreover, the FBI and Mr. Bonadonna identified Simone as a member of the Kansas City LCN. In 1988, Simone was identified during Senate Subcommittee hearings as a "Capo" in a Kansas City organized crime family. *See id.* at 9. In addition, Simone's criminal record indicates that he has participated in illegal enterprises reputedly dominated by organized crime. In 1976, Mr. Simone was convicted of operating an interstate gambling operation. *See id.* at 10. In 1992, Simone pled guilty to a federal money laundering charge and to an unrelated charge of operating an illegal casino. *See id.* Numerous

FBI confidential sources and newspaper articles corroborated that Mr. Simone was a member of the Kansas City LCN. *See id.*

Finally, testimony at Mr. DiGirlamo's disciplinary hearing showed that the FBI considers Frank Anthony Tousa to be a member of the Kansas City LCN. In Senate Subcommittee testimony, Mr. Bonadonna identified Tousa as a member of the LCN who controls certain illegal gambling operations on behalf of the LCN. *See id.* at 11.[3] Substantial corroborative evidence, in the form of newspaper reports recounting Tousa's involvement with organized crime, was adduced before the Independent Administrator.

In sum, Mr. DiGirlamo's contention that the Independent Administrator's decision is arbitrary and capricious because the evidence did not demonstrate that C. Moretina, J. Moretina, Simone and Tousa are associated with the Kansas City LCN or an organized crime organization is wholly without merit.

B. *Mr. DiGirlamo's Contacts with Charles Moretina, James J. Moretina, Peter Joseph Simone and Frank Anthony Tousa Brought Reproach Upon the IBT*

Mr. DiGirlamo's argument that his contact with C. Moretina, J. Moretina, Simone and Tousa was innocent or

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[3] It should also be noted that in 1977, Mr. DiGirlamo was convicted along with Tousa and Simone in connection with an illegal interstate gambling operation. As the Independent Administrator properly found, "[t]he fact that DiGirlamo was involved in illegal activities with these individuals in 1977 provides insight into the nature and duration of his associations." Ind.Admin.Dec. at 7.

familial, and thus beyond the purview of the relevant disciplinary provisions, is unavailing. First, a knowing and purposeful association between an IBT officer and a LCN figure cannot be deemed an "innocent" association. *See* May 9, 1991 Memorandum & Order, 764 F.Supp. 797 (S.D.N.Y.1991), *aff'd, United States v. IBT*, 956 F.2d 1161 (2d Cir.1992); *see also* April 27, 1992 Memorandum & Order, 791 F.Supp. 421 (S.D.N.Y.1992). More importantly, however, Mr. DiGirlamo's substantial contacts with C. Moretina, J. Moretina, Simone and Tousa despite his awareness of their ties to organized crime, negates Mr. DiGirlamo's content that these relationships did not bring reproach upon the Union.

As an initial matter. Mr. DiGirlamo concedes that there exists evidence from which his knowledge of C. Moretina's ties to organized crime may be inferred. *See* Brief in Opposition at 13 ("In view of DiGirlamo's knowledge of [Charles Moretina's] conviction in 1983 for casino skimming we do not argue that [Mr. DiGirlamo] had no knowledge of Charles Moretina's underworld ties."); *see also Post-Hearing Memorandum of Nicholas A. DiGirlamo to the Independent Administrator* at 12 (conceding that, based upon the evidence adduced, the Independent Administrator could find that Mr. DiGirlamo knew of C. Moretina's ties to the LCN). As the Independent Administrator properly found. "[g]iven DiGirlamo's close relationship with C. Moretina, it would be inconceivable that DiGirlamo would not know of [C. Moretina's] organized crime connections." *See* Ind.Admin.Dec. at 17. However, rather than avoiding contact with C. Moretina, Mr. DiGirlamo encouraged a close relationship. For example, Mr. DiGirlamo's car was observed by the FBI outside of C.

Moretina's house during working hours. *See id.* at 13-14. Moreover, Mr. DiGirlamo attended C. Moretina's federal criminal trial, and subsequently visited him several times in prison. *See id.* at 14; *see also* Brief in Opposition at 15 ("DiGirlamo visited [C. Moretina] four or five times while he was incarcerated in a federal prison."). Thus, it is clear that Mr. DiGirlamo freely associated with C. Moretina, who Respondent knew to have ties to the Kansas City LCN. Therefore, the Independent Administrator's finding that this conduct brought reproach upon the IBT is not arbitrary or capricious.

Furthermore, "[a]s with C. Moretina, it would be inconceivable for DiGirlamo not to have known of J. Moretina's organized crime ties given the nature of this relationship to him." *See* Ind. Admin.Dec. at 19. Nevertheless, Mr. DiGirlamo knowingly associated with J. Moretina. In 1978, J. Moretina helped Mr. DiGirlamo find employment. *See id.* at 14. In 1985, J. Moretina, along with Peter Simone, hired DiGirlamo as accountant for the Be Amused Vending and Amusement Company ("Be Amused").[4] *See id.* In this capacity, Mr. DiGirlamo had daily contact with J. Moretina, visited his house, and frequently spoke to him on the telephone. *See id.* In light of their close relationship, and the fact that Mr.DiGirlamo must have been aware of J. Moretina's ties to organized

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[4] While Mr. DiGirlamo was working for "Be Amused," the FBI seized illegal gambling apparatus owned by "Be Amused." *See* Ind.Admin.Dec. at 4. Although Mr. DiGirlamo was not indicated in connection with this matter, J. Moretina, Simone and several other "Be Amused" employees were convicted on charges of participating in a money laundering and illegal gambling scheme. *See id.* at 4-5.

crime, the Independent Administrator's finding that this knowing association brought reproach upon the IBT is not arbitrary and capricious.

Moreover, Mr. DiGirlamo has had substantial contact with Peter Joseph Simone and, in light of their long relationship, must have known of Simone's ties to the underworld. Mr. DiGirlamo and Simone have known each other since grade school. *See id.* at 20. They have remained in frequent contact over the years: together they participate in community-based sporting activities, and their daughters are close friends. *See id.* at 20. Over the years, Simone and Mr. DiGirlamo frequently visited each other's homes. *See id.* Finally, Mr. DiGirlamo admits that he occasionally went to Simone's illegal gambling hall to pick up "Be Amused's" books, and conversed with Simone while there. *See id.* at 21. Therefore, Mr. DiGirlamo clearly encouraged a close association with Mr. Simone and it defies credulity to believe, in this context, that Mr. DiGirlamo was unaware of Simone's criminal activities. As such, the Independent Administrator's finding that Mr. DiGirlamo brought reproach on the IBT by knowingly associating with Simone is not arbitrary or capricious.

Finally, Mr. DiGirlamo's knowing association with Frank Anthony Tousa is well established in the record. Mr. DiGirlamo has admitted that he read newspaper articles discussing Tousa's ties to the Kansas City underworld. *See id.* at 22. Nevertheless, Mr. DiGirlamo prepared Tousa's and his wife's personal income tax returns. *See id.* In connection with this work, Mr. DiGirlamo spent time at Tousa's home. *See id.* Given this contact, and substantial evidence that Mr. DiGirlamo was

aware of Tousa's criminal activities, the Independent Administrator's finding that Mr. DiGirlamo brought reproach on the IBT by knowingly associating with Tousa is not arbitrary or capricious.

In sum, therefore, evidence adduced before the Independent Administrator established that C. Moretina, J. Moretina, Simone and Tousa were members of the Kansas City La Cosa Nostra. Moreover, Mr. DiGirlamo's associations with these men were purposeful and not incidental or fleeting. The evidence established that Mr. DiGirlamo engaged in long-term relationships with these men in spite of the fact that he was aware of their ties to organized crime. Despite Mr. DiGirlamo's protestations to the contrary, such behavior is antithetical to any standard of appropriate conduct for a Union official. Indeed, it is such conduct that has allowed organized crime to fester within the IBT. Accordingly, the Independent Administrator's findings were neither arbitrary nor capricious and the Independent Administrator's decision is therefore affirmed.

3. *Respondent's Unauthorized "Supplemental Memorandum in Opposition to the Decision of the Independent Administrator"*

Although Respondent's counsel was advised that this Court does not accept reply brief in connection with IBT disciplinary matters. Respondent nevertheless filed a "Supplemental Memorandum in Opposition to the Decision of the Independent Administrator," dated March 4,

1993. Counsel has been advised by telephone that submission of this unauthorized "Supplemental Memorandum" was improper. Furthermore, because the arguments contained in this memorandum are raised therein for the first time, these arguments are not properly the subject of a reply memorandum.

Nonetheless, this Court has taken a look at the arguments contained therein. Succinctly stated. Respondent takes the patently frivolous position that the disciplinary action against Respondent violated his due process rights. In making such an argument. Respondent's counsel has overlooked a substantial body of precedent.

Respondent received a fair hearing as required by the Consent Decree. The disciplinary charge against Mr. DiGirlamo was sufficiently specific to withstand scrutiny. Similar charges filed under the Consent Decree repeatedly have been found to be sufficiently specific and within the requirements of the Labor-Management Reporting and Disclosure Act ("LMRDA"). *See, e.g., United States v. IBT*, 964 F.2d 1308, 1310 (2d Cir.1992); *United States v. IBT*, 941 F.2d 1292, 1294-95 (2d Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1161, 117 L.Ed.2d 408 (1992); May 9, 1991 Memorandum & Order, 764 F.Supp. 797, 800-01 (S.D.N.Y.1991), *aff'd, United States v. IBT*, 956 F.2d 1161 (2d Cir.1992). Moreover, contrary to Respondents' assertion, the provisions of the IBT Constitution that Mr. DiGirlamo was charged with violating are not unconstitutionally vague. *See United States v. IBT*, 941 F.2d 1292, 1298 (2d Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1161, 117 L.Ed.2d 408 (1992) ("[B]ecause it should have been clear to [Respondents] that associating with known members of organized crime would bring reproach upon

the IBT, sanctioning them for these activities is not constitutionally infirm.").

Respondent's remaining constitutional arguments are similarly without merit. Perhaps if Respondent's counsel had conducted some rudimentary legal research, Respondent would have been deterred from burdening this Court with such untenable arguments. It is now well settled that the Independent Administrator is not a state actor and his conduct in connection with disciplinary proceedings does not constitute state action. *See United States v. IBT*, 941 F.2d 1292, 1295-98 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1161, 117 L.Ed.2d 408 (1992); *see also United States v. IBT*, 954 F.2d 801, 806-07 (2d Cir.1992); *United States v. IBT*, 981 F.2d 1362, 1371 (2d Cir.1991). As such Respondent's due process, and other constitutional arguments, must fail.

In any event, Respondent received a fair and impartial hearing before the Independent Administrator, a former federal judge. Mr. DiGirlamo was represented by counsel, submitted written brief to the Independent Administrator, and was given the opportunity to, and did, cross-examine adverse witnesses. All evidence against Respondent that was introduced at the disciplinary hearing was given to him in advance of the hearing. Mr. DiGirlamo testified in his own behalf and called witnesses in his defense. After carefully considering all the evidence, the Independent Administrator issued a written opinion. As such, the disciplinary action against Respondent complied with the Consent Decree and all applicable law.

Finally, the disciplinary action against Respondent did not violate the LMRDA's free speech provisions. *See* 29 U.S.C. § 411(a)(2). As Respondent's counsel should have learned in the course of conducting legal research on his client's behalf, this Court has held that "[t]he IBT's sanctioning members in order to rid itself of corrupt influence conforms with § 101(a)(2) of the LMRDA, and infringes no First Amendment rights." Aug. 27, 1990 Opinion & Order, 745 F.Supp. 908, 913 (S.D.N.Y.1990), *aff'd*, 941 F.2d 1292 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1161, 117 L.Ed.2d 408 (1992). Thus, this argument is without merit.

4. *The Penalty*

Respondent's final argument, contained in his Brief in Opposition, is that the penalty imposed on Mr. DiGirlamo by the Independent Administrator is arbitrary and capricious because it is "far more harsh than that imposed in the far more grievous cases." Brief in Opposition at 46. This argument is without merit. The Independent Administrator carefully considered Mr. DiGirlamo's participation in the charged offense as well as factors in mitigation of punishment. Mr. DiGirlamo's belief that the sanctions imposed are "harsh" does not make the Independent Administrator's decision arbitrary or capricious. *See United States v. IBT*, 981 F.2d 1362, 1371-2 (2d Cir.1992).

Both this Court and the Second Circuit have held that the Independent Administrator, who presides over disciplinary hearings pursuant to the Consent Decree, is best situated to determine and fix the penalty to be imposed

upon IBT members who violate the Consent Decree's disciplinary provisions. *See United States v. IBT*, 978 F.2d 68, 74 (2d Cir.1992). In doing so, he is entitled to great deference. *See United States v. IBT*, 981 F.2d at 1372; *United States v. IBT*, 978 F.2d at 74; March 5, 1993 Opinion & Order, 817 F.Supp. 337, 347 (S.D.N.Y.1993). This is a matter of critical importance. The Independent Administrator conducts the hearings and thus is best equipped to evaluate the demeanor, credibility and, ultimately, the culpability, of those who appear before him. *See id.*, Feb. 9, 1993 Opinion & Order, 814 F.Supp. 1165, 1178 (S.D.N.Y. 1993). It follows that he is also uniquely situated to choose an appropriate penalty. *See* June 10, 1993 Memorandum & Order, 824 F.Supp. 406, 409 (S.D.N.Y.1993); March 5, 1993 Opinion & Order, 817 F.Supp. 337, 347. As the Second Circuit has stated, "[t]he experienced independent administrator – himself a former federal district judge – heard the witnesses and fixed a penalty. On this record there is no basis for finding the penalty chosen by the administrator was either arbitrary or capricious." *United States v. IBT*, 978 F.2d at 74.

An example of the Independent Administrator's great discretion in determining an appropriate penalty is found in *United States v. IBT ("Sansone")*, 981 F.2d at 1371-2. In *Sansone*, the Second Circuit refused to overturn the Independent Administrator's decision to permanently bar the President of IBT Local 682, Robert S. Sansone, from holding Union office, even though the Court of Appeals indicated that it might have reached a different result. *See id.* at 1372. As the Second Circuit stated, "the apparent discrepancy between the penalty imposed here and those imposed in other cases does not inexorably

compel the conclusion that the Independent Administrator acted arbitrarily or capriciously." *Id.*

Finally, no discrepancy exists between the penalty imposed here and that imposed in prior cases involving analogous conduct. *See, e.g.*, July 13, 1992 Opinion & Order, 803 F.Supp. 740, 741 (S.D.N.Y.1992) (IBT officer permanently banished from the Union for failing to investigate allegations that fellow officers were members of the LCN). Many other IBT members found to have knowingly associated with LCN members have been permanently banished from the Union. *See, e.g.*, April 27, 1992 Memorandum & Order, 791 F.Supp. 421, 423 (S.D.N.Y.1992) (IBT member permanently banished for knowingly associating with LCN member); January 16, 1992 Memorandum & Order, 782 F.Supp. 238, 240 (S.D.N.Y.1992) (same); October 16, 1991 Memorandum & Order, 777 F.Supp. 1130, 1131 (S.D.N.Y.1991) (same). The Independent Administrator's decision to impose this penalty on Mr. DiGirlamo is well supported by the record in this disciplinary action.

Thus, Respondent's claim that the penalties imposed in the instant matter are arbitrary and capricious because they are "severe" or "harsh" is unpersuasive. The Independent Administrator carefully considered the evidence presented. In light of the seriousness of Mr. DiGirlamo's wrongdoing, the penalty fixed by the Independent Administrator was appropriate and was not arbitrary or capricious.

5. *Respondent's Application for A Stay*

Mr. DiGirlamo requests that this Court stay imposition of the penalties imposed by the Independent Administrator. The factors regulating the issuance of a stay are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987). Applying these criteria to the instant application, I find that a stay is not appropriate.

First, Mr. DiGirlamo has not made a strong showing that he is likely to succeed on the merits. This Court and the Independent Administrator have found that Mr. DiGirlamo committed the charged conduct and that this conduct merits severe disciplinary sanctions. After lengthy analysis in written opinions, both the Independent Administrator and his Court have concluded that Respondent's arguments are without merit. Thus, Mr. DiGirlamo cannot be considered likely to achieve success on the merits.

Second, I find that Mr. DiGirlamo will not suffer irreparable harm from the denial of a stay. Indeed. Respondent does not even contend that any injury that he might suffer is "irreparable." Rather, Respondent claims that he will suffer "injury" absent a stay because "[h]is employment by the union is the main source of his income. He is now unemployed." Brief in Opposition at

53. This purported injury does not rise to the level of irreparable harm. Even if Respondent succeeds on appeal, an award of back pay would redress any injury to Mr. DiGirlamo: "Irreparable injury is one that cannot be addressed through a monetary award. [Thus,] where money damages are adequate compensation [injunctive relief] should not issue." *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir.1990); *see Johnpoll v. Thornburgh*, 898 F.2d 849, 851 (2d Cir.), *cert. denied*, 498 U.S. 819, 111 S.Ct. 63, 112 L.Ed.2d 38 (1990); *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 974-75 (2d Cir.1989). In addition, permanent banishment from the IBT is remedied by reinstatement in the IBT should Mr. DiGirlamo prevail on appeal. Therefore, Mr. DiGirlamo has failed to allege that type of injury necessary to support the issuance of a stay.

Third, any injury to Mr. DiGirlamo is outweighed by the potential harm to the Union should Mr. DiGirlamo be permitted to retain IBT membership pending appeal. The Independent Administrator and this Court have found that Mr. DiGirlamo knowingly associated with persons tied to the Kansas City LCN. Historically, conduct of this type allowed organized crime to gain a foothold in, and ultimately to corrupt, the IBT. *See United States v. IBT*, 981 F.2d at 1372 ("[T]his case involves the IBT and its crimson record of corruption . . . [one goal of the Independent Administrator is] to maintain the institutional integrity of the Union and to dissipate a climate where union officials acquiesce in the criminal exploits and their colleagues.). Knowing association is particularly insidious because such conduct often has allowed La Cosa Nostra and other criminal organizations to quietly corrupt an otherwise

legitimate labor organization. I find that Respondent has failed to demonstrate that the issuance of a stay will not injure other parties interested in these proceedings.

Finally, the public interest would not be furthered by the issuance of a stay. The public interest lies in the maintenance of a Union that serves the needs, and advocates the interests, of its members. The public interest is furthered by actions that help the IBT to expeditiously eradicate from its ranks the scourge of organized crime. Those members of the IBT, such as Mr. DiGirlamo, who knowingly associate with members of the LCN bring reproach upon the Union and allow the taint of organized crime to attach to the IBT. It is clearly not in the public interest to delay removal from the IBT of persons who are found to have knowingly associated with members of organized crime. Thus, Mr. DiGirlamo's application for a stay must be denied.

CONCLUSION

IT IS HEREBY ORDERED that Respondent's objections to the Independent Administrator's decision are DENIED; and

IT IS FURTHER ORDERED that the decision of the Independent Administrator is AFFIRMED in its entirety; and

IT IS FURTHER ORDERED that Respondent's application for a stay is DENIED.

SO ORDERED.

APPENDIX D

INVESTIGATIONS OFFICER, Claimant, v. NICHOLAS A. DIGIRLAMO, Respondent.	**DECISION OF THE INDEPENDENT ADMINISTRATOR**

This matter relates to the following charge filed by the Investigations Officer against Nicholas A. DiGirlamo ("DiGirlamo"), bookkeeper for, and a member of, IBT Local 41 in Kansas City, Missouri, and the bookkeeper for IBT Joint Council 56:

> While a member and employee of IBT Local 41 [he] brought reproach upon the IBT and violated [his] membership oath in violation of Article II, Section 2(a) and Article XIX, Section 7(b)(1) and (2) of the IBT Constitution, *to wit*:
>
> From 1978 to the present, while a member and employee of IBT Local 41, [he] knowingly associated with members of La Cosa Nostra "LCN," including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone and Frank Anthony Tousa. From 1978 to the present, [he] also knowingly associated with associates of LCN including, but not limited to, John Anthony Costanza and Nicholas Joseph Labruzzo.

A hearing was held before me and post-hearing submissions were received from DiGirlamo and the Investigations Officer. Having reviewed the evidence presented and the post-hearing memoranda, I find that the Investigations Officer has met his just cause burden of proving the charge against DiGirlamo by a preponderance of the evidence. *See Investigations Officer v. Salvatore*, Decision of the Independent Administrator (October 12, 1990), *aff'd, United States v. IBT*, 754 F. Supp. 333 (S.D.N.Y. 1990) (affirming the "preponderance of the evidence" standard).

I. CONSTITUTIONAL PROVISIONS

The charge against Respondent implicates two provisions of the IBT Constitution. First, Article XIX, Section 7(b), sets forth a non-exhaustive list of grounds for bringing disciplinary charges. That list includes:

> (1) Violation of any specific provision of the Constitution, Local Union By-Laws or rules of order, or failure to perform any of the duties specified thereunder.
>
> (2) Violation of oath of office or the oath of the loyalty to the Local Union and International Union.
>
> * * *
>
> (9) Knowingly associating (as that term has been defined in prior decisions and disciplinary charges under this Article) with any member or associate of any organized crime family or any other criminal group.

Second, Article II, Section 2(a) is also implicated. This section, which contains the oath of office mentioned in Article XIX, Section 7(b)(2), mandates that all members shall conduct themselves "at all times in such a manner as not to bring reproach upon the Union. . . . "

II. BACKGROUND

A. DiGirlamo's Relations

DiGirlamo is married to the daughter of Charles Moretina ("C. Moretina"). T130-18 to 21, T138-18 to 21.[1] In addition, James Moretina ("J. Moretina"), C. Moretina's son, is DiGirlamo's brother-in-law. IO-1 at 62.[2]

B. DiGirlamo's Work History

DiGirlamo first joined the IBT and Local 41 in 1978. T131-6 to 11. He joined the Union so that he could work for American Freight. J. Moretina had helped him find work there. IO-1 at 52-53. DiGirlamo was hired as a bookkeeper for Local 41 in 1980 by John Couts ("Couts"), then President of Local 41. T131-16 to 20.

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[1] Citations to the June 29, 1992, hearing held before me contain both page and line references. For example the citation "T130-18 to 21" refers to page 130 of the transcript, lines 18 through 21.

[2] Citations to "IO" refer to the Investigations Officer's Exhibits. In this case, "IO-1 at 62" refers to the Investigations Officer's Exhibit 1 at page 62.

Although DiGirlamo testified that he did not have any "knowledge that Carl Civella[3] or any LCN member or associate [had] anything to do with" his being hired as Local 41's bookkeeper (T131-21 to 24), Local 41's current President, Daniel E. Johnson ("Johnson") testified that "Couts was involved very heavily in the LCN as an associate and that jobs were given to people that were asked for by [Carl] Civella." T116-2 to 4. Johnson's testimony was corroborated by the FBI.[4] T56-4 to T57-5.

In 1985, along with "several office employees," Couts fired DiGirlamo as the Local's bookkeeper. Johnson testified that he "assume[d]" this was because "the LCN and Mr. Couts had a falling out [and Couts] was very paranoid about where he would go and what he would do." T116-14 to T117-2.[5]

Shortly after he was fired as Local 41's bookkeeper, DiGirlamo started a part-time accounting practice. T134-17 to T135-2. DiGirlamo was then retained (in late 1985), by J. Moretina and Peter Simone ("Simone") to do "the books" for the Be Amused Vending Company ("Be

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[3] Nick Civella was identified by the FBI as the boss of the Kansas City La Cosa Nostra from the mid-1950's until his death in 1983. Nick Civella's older brother, Carl Civella, was identified as the underboss throughout this period and continued as boss after Nick Civella died. IO-11 at 14.

[4] Indeed, a reliable confidential informant provided the FBI with information that Carl Civella controlled the hiring and firing of employees at Local 41, and was instrumental in Digirlamo obtaining his accounting position with the Local. IO-11 at ¶ 22.

[5] This was not the first time DiGirlamo was fired by Couts. *See infra* at p. 14.

Amused"). J. Moretina was the president of "Be Amused," Simone's wife was the company's treasurer, and Simone himself was an employee. T144-1 to 9; T140-22 to T141-2; IO-1 at 76; IO-J at 2.

While DiGirlamo was working for "Be Amused," the FBI seized video poker machines owned by "Be Amused". IO-1 at 77. An indictment against J. Moretina, Simone and four other "Be Amused" employees (not including DiGirlamo), was subsequently brought in the Summer of 1991. T144-13 to 17; IO-1 at 147-148. Convictions for money laundering and illegal gambling were ultimately obtained. *Id.*

In November of 1991, DiGirlamo delivered his resignation to J. Moretina. In his resignation DiGirlamo stated that he would work until the year's end "or until you find a new accountant." IO-8; IO-1 at 77. As late as March of 1992, DiGirlamo testified that he would be helping "Be Amused" with its 1991 tax return. IO-1 at 156-57.

In 1988, while still employed by "Be Amused," DiGirlamo was rehired by Johnson as Local 41's bookkeeper. T110-7 to 9. DiGirlamo has also been the bookkeeper for Joint Council 56 since September of 1991.

III. THE SCOTT DECLARATION

At the hearing, the Investigations Officer's introduced the sworn Declaration of FBI Special Agent Cullen A. Scott ("the Scott Declaration"). IO-11. The Scott Declaration was supplemented by his testimony on direct and cross-examination.

Agent Scott has been a Special Agent of the FBI for over twenty-three years. IO-11 at ¶ 1. Since 1980, Agent Scott has been assigned to the Kansas City Field Division Organized Crime Squad and, during this period, has been involved in numerous investigations of La Cosa Nostra ("LCN") activities. *Id.* at ¶ 2. Agent Scott is also familiar with other criminal investigations by the FBI concerning LCN activities. *Id.* Moreover, Agent Scott is fully knowledgeable of the investigative techniques used by the FBI in organized crime investigations and, during his twenty-three years with the FBI, has interviewed, met, surveyed, observed, arrested LCN members and associates, and testified in past criminal prosecutions involving LCN members and associates. *Id.* DiGirlamo did not challenge Agent Scott's credentials.

Given Agent Scott's extensive background and experience, I accept him as an expert knowledgeable in the investigation into the structure of organized crime in the Kansas City, Missouri, area.

IV. DIGIRLAMO'S EVIDENTIARY OBJECTIONS

DiGirlamo raised several evidentiary objections based generally on the grounds of lack of relevance, prejudice, and hearsay.[6] To the extent these objections warrant comment, they are discussed below.

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[6] I made it clear during the hearing that evidentiary objections could be made in post-hearing submissions and that a failure to make an objection during the hearing would not result in the waiver of that objection. T14-6 to 16.

DiGirlamo first objects to references in the Investigations Officer's proofs to reported LCN members and associates not named in the charge. DiGirlamo suggests that references to these individuals "create a prejudicial aura of unmitigated evil and a picture of an LCN dominated union." DiGirlamo Post-Hearing Memorandum at 4-5. The answer to this objection is simply that DiGirlamo's knowledge of his associates' LCN connections is relevant to the issue of whether he "knowingly associated" with underworld figures. For example, the Investigations Officer introduced evidence that DiGirlamo attended Nick Civella's funeral. While DiGirlamo is not charged with associating with Civella, he is charged with associating with J. Moretina. Evidence was received indicating that J. Moretina was also at the Civella funeral. Thus, DiGirlamo's presence at Civella's funeral is relevant to DiGirlamo's knowledge of J. Moretina's underworld ties.

DiGirlamo also objects, as "irrelevant and prejudicial," to any consideration by me of his 1977 conviction for participating in an illegal gambling operation. *Id.* at 9. This objection is without merit. Three of DiGirlamo's alleged associates were indicted and convicted as coconspirators in that gambling operation: Simone, Frank Anthony Tousa ("Tousa"), and John Anthony Costanza ("Constanza"). The fact that DiGirlamo was involved in illegal activities with these individuals in 1977 provides insight into the nature and duration of his associations.

Finally, DiGirlamo argues that certain exhibits and the testimony of Agent Scott are based on inadmissible hearsay. However, in these proceedings, evidence based on hearsay, if reliable, is admissible. *Investigations Officer*

v. Senese, et al., Decision of the Independent Administrator at 23 (July 12, 1990), *aff'd, United States v. IBT*, 745 F. Supp. 908, 914-15 (S.D.N.Y. 1990) (Hearsay evidence, if reliable, is admissible.), *aff'd*, 941 F.2d 1292, 1297-98 (2d Cir. 1991). To the extent such evidence has been relied on herein, I have found it to be reliable and therefore admissible.

V. THE ORGANIZED CRIME CONNECTIONS OF DIGIRLAMO'S ASSOCIATES

The Investigations Officer alleges that DiGirlamo has associated with four members of the Kansas City LCN: C. Moretina, J. Moretina, Simone, and Tousa; and two LCN associates: Costanza and Joseph LaBruzzo ("LaBruzzo"). The first step in the analysis is to determine whether the Investigations Officer has proven that these men are linked to the Kansas City LCN as alleged.

A. Charles Moretina

In his Declaration, Agent Scott indicates that the FBI considers C. Moretina to be a member of the Kansas City LCN. IO-11 at ¶ 18.

The FBI's identification of C. Moretina as a member of the Kansas City LCN is corroborated by the testimony of Fred Harvey Bonadonna ("Bonadonna"), an FBI informant and a participant in the Federal Witness Protection Program. IO-2 at 177. In 1980, during a hearing before the Permanent Subcommittee on Investigations of the United States Senate (the "Senate Subcommittee"), Bonadonna testified that C. Moretina was not only a

member of organized crime, but also regarded as a "killer" for Carl "Tuffy" DeLuna ("DeLuna"), "underboss and working boss" of the Kansas City organized crime family. IO-2 at 194. Further, numerous newspaper articles identified C. Moretina as a member of organized crime. IO-5

Moretina was also convicted along with DeLuna, Carl Civella and others in connection with a 1981 indictment brought in the United States District Court for the Western District of Missouri, arising out of a Las Vegas casino skimming operation involving the Tropicana Hotel.[7] *See United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985). C. Moretina is currently serving a 20-year sentence in a federal penitentiary as a result of that conviction. IO-11 at ¶ 20.

I find the identification of C. Moretina as a member of the Kansas City LCN by Agent Scott to be well corroborated and thus I accept it. In fact, DiGirlamo himself, in his post-hearing submission, concedes that "[t]here is, admittedly, evidence upon which the Independent Administrator could find that Charles Moretina was a member of organized crime. . . . " DiGirlamo Post-Hearing Memorandum at 12.

B. Peter Simone

The FBI considers Simone to be a member of the Kansas City LCN. IO-11 at ¶ 18. This finding is also well supported in the record.

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[7] Nick Civella was also named as a defendant in the case, but died shortly before trial.

In 1988, Simone was identified as a "Capo"[8] in the Kansas City organized crime family during Senate Subcommittee hearings entitled "Organized Crime: 25 Years After Valachi." IO-4 at 765. In addition, in his 1980 Senate Subcommittee testimony, Bonadonna identified Simone as "the up-and-coming gambler in the area, [who] is the one in charge of the [LCN's] casinos" in Kansas City. IO-2 at 194. This is consistent with Simone's several gambling convictions.

On June 22, 1976, Simone was convicted in the United States District Court for the Western District of Missouri of operating an interstate gambling operation. IO-11 at ¶¶ 21, 29. In 1992, Simone also entered into a plea agreement arising from a federal money laundering charge relating to the "Be Amused" video poker scheme. IO-11 at ¶ 30. In those same proceedings, Simone also pled guilty to the operation of a second, unrelated, illegal casino and gambling business. *Id.*

In addition, Simone was identified by "numerous confidential sources" as a made member of the Kansas City LCN. IO-11 at ¶ 29. There are also numerous newspaper articles from 1983 through 1992 that have referred to Simone as a member of organized crime. IO-5.

Given these corroborating proofs, I find that the Investigations Officer has established that Simone is a member of the Kansas City LCN.

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[8] Agent Scott defines a "Capo," or Caporegime, as a first-line supervisor or "Street Boss" who supervises other LCN members and associates who are organized into "Street Crews." Scott Declaration at ¶ 6.

C. James Moretina

In his declaration, Special Agent Scott states that J. Moretina has been identified by the FBI as a member of the Kansas City LCN. IO-11 at ¶ 18. The FBI's identification of J. Moretina as an LCN member has been corroborated by "numerous confidential sources." IO-11 at ¶ 27.

In addition, J. Moretina's car was observed by the Law Enforcement Intelligence Unit of the Kansas City, Missouri, Police Department at Nick Civella's funeral. IO-11 at Ex. H.

As discussed earlier, J. Moretina is also the President of "Be Amused," which he co-owns with the wife of LCN member Simone, a "Be Amused" employee. IO-1 at 142. In 1992, J. Moretina, along with Simone, pled guilty to laundering illegal gambling proceeds in connection with the "Be Amused" case. IO-11 at ¶ 28.

Given all this, I conclude that it has been established by the Investigations Officer that J. Moretina is a member of the Kansas City LCN.[9]

D. Frank Anthony Tousa

The FBI considers Tousa to be a member of the Kansas City LCN. IO-11 at ¶ 18. IO-1 at 15; IO-11 at ¶ 21. In his Senate Subcommittee testimony, Bonadonna identified Tousa as the member of the Kansas City LCN who

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[9] J. Moretina also worked at Local 41 as Business Agent while Couts was president, and was fired along with DiGirlamo when Couts allegedly had his falling out with the Kansas City LCN. *See supra*, p. 4.

runs their "football bets" and is "their Las Vegas connection." In 1976, Tousa was arrested, indicted and convicted along with DiGirlamo and Simone in connection with the illegal interstate gambling operation charges. IO-2 at 194. Furthermore, several newspaper articles have referred to Tousa as a mob leader. IO-5.

The FBI's identification of Tousa as a member of the Kansas City LCN is corroborated by Bonadonna's testimony. Tousa's gambling conviction, in turn, is consistent with Bonadonna's portrayal of Tousa as being involved with the Kansas City LCN's gambling operation. The newspaper reports are consistent with the identification of Tousa as an LCN member. Accordingly, I find that the Investigations Officer has established that Tousa is a member of the Kansas City LCN.

E. John Anthony Costanza and Nicholas Joseph LaBruzzo

The FBI has identified both Costanza and LaBruzzo as associates of the Kansas City LCN. IO-11 at ¶ 19. While Agent Scott states that these associations are based on "investigations and other reliable and credible information," no specifics are provided, nor is there any indication that FBI sources have identified Costanza and LaBruzzo as LCN associates. Accordingly, the identification of these two men is unsupported based upon the record now before me.

VI. DIGIRLAMO'S ASSOCIATIONS

The next step in determining whether a prohibited "knowing association" has been established is for the Investigations Officer "to show that the contacts in question are purposeful and not incidental or fleeting." *Investigations Officer v. Senese, et al., supra,* Decision of the Independent Administrator at 35-37. "Such contacts may be shown in either a business or social context." *Id.* Lastly, "the focus will be placed on the nature and not the number of contacts in question." *Id.*

Following these guidelines, it is clear, based on the discussion of the evidence which follows, that DiGirlamo has purposefully associated with C. Moretina, J. Moretina, Simone and Tousa.

A. Charles Moretina

When DiGirlamo was applying for the accountant's position at Local 41 in 1980, he mentioned that fact to C. Moretina. IO-1 at 61-62. Thereafter DiGirlamo was hired to work at Local 41 by Couts, the then Local 41 President. T131-16 to 20. As noted earlier, although DiGirlamo testified that he did not know whether any LCN influence was brought to bear upon his hiring (T131-21 to 24), both the present Local 41 President, Johnson, and the FBI believe that "Couts was involved very heavily in the LCN as an associate and that jobs were given to people that were asked for by [Carl] Civella." T116-2 to 4; T56-4 to T57-5. Indeed, a confidential informant advised the FBI that, at the time Digirlamo was hired by Local 41, Carl "Corky" Civella controlled the hiring and firing at Local

41 and "was instrumental in getting Digirlamo the accountant job." IO-11 at ¶ 22.

On April 18, 1983, DiGirlamo's car and a car owned by Tom Nabors, an IBT Joint Council 56 Organizer, were observed by the FBI at C. Moretina's house during "working hours." IO-11 at ¶ 24 Ex. I.

In June of 1983, DiGirlamo attended Moretina's trial in the Las Vegas casino skimming case. IO-1 at 106-07. Couts fired DiGirlamo that same year for allegedly making an advance towards Couts' daughter. This was before Couts' 1985 mass firing. At the time of his 1983 firing, DiGirlamo then spoke with C. Moretina about what Couts had done. The next time DiGirlamo spoke with Couts, Couts "started crying and telling DiGirlamo that he was a "perfect gentleman." IO-1 at 73-74. Couts asked for DiGirlamo's forgiveness and DiGirlamo then went back to work for the Local. *Id.*[10]

DiGirlamo also visited C. Moretina "four or five times while [he] was incarcerated" in a federal prison. DiGirlamo Post-Hearing Brief at 13; IO-1 at 68-72.

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[10] I need not determine whether C. Moretina in fact brought pressure to bear upon Couts to hire DiGirlamo in 1980 or rehire him in 1983. It is reproachful conduct, under the circumstances of this case, to discuss any Union matter, even the employment of oneself, with an individual known to be a member of LCN. DiGirlamo's knowledge of C. Moretina's LCN ties is discussed *infra* at 16-19.

B. James Moretina

In 1978, J. Moretina helped DiGirlamo find work with America Freight. IO-1 at 52-53. In 1985, J. Moretina, along with Peter Simone, hired DiGirlamo as "Be Amused" 's accountant. T140-22 to T141-2; IO-11 at Ex 3 p. 2. In that capacity, DiGirlamo came in contact and spoke with J. Moretina on a regular and frequent basis. These contacts included DiGirlamo going to "Be Amused" 's office and J. Moretina's home once or twice a month to pick up or drop off "Be Amused" 's books and records. IO-1 at 143. During these visits he would speak with J. Moretina. *Id.* at 147.

J. Moretina has telephoned DiGirlamo at Local 41's offices and spoken with him about Local 41 business. DiGirlamo recalled one telephone conversation in which J. Moretina asked DiGirlamo whether "Danny," presumably Daniel E. Johnson, then Local 41 President, had any opposition in the upcoming Local 41 officer election. IO-11 at 166. *See also,* T25-8 to T29-25 (transcript of FBI intercepted conversation between J. Moretina and DiGirlamo).

During another telephone conversation, J. Moretina asked DiGirlamo about the existence of a list of dentists to be used by Local 41 members for referral purposes. IO-N; T22-6 to T23-25.

C. Peter Simone

Simone was arrested and indicted in 1975 along with DiGirlamo in connection with their gambling operation.

IO-11 at ¶ 21. Both men were ultimately convicted. IO-11 at ¶¶ 21, 29.

Simone was in on the decision, along with J. Moretina, to hire DiGirlamo to do the accounting work for "Be Amused". IO-11 at Ex J. ¶ 2. Through his work at "Be Amused," DiGirlamo had regular contact with Simone. As already established, DiGirlamo would visit "Be Amused" offices regularly to retrieve its books. IO-1 at 143. When DiGirlamo would see Simone at "Be Amused" he would stop and talk with him. IO-1 at 144. DiGirlamo would also sometimes go to the location of Simone's illegal gambling hall to pick up "Be Amused" books from Simone, and that while there he would speak with Simone. IO-1 at 158-160; IO-6. In addition, Simone called DiGirlamo at Local 41's offices. *Id.* at 165. DiGirlamo also socialized with Simone, playing "a lot of softball [and] basketball" and has been inside his home. *Id.* at 151.

D. Frank Tousa

DiGirlamo's admits that in 1985 or 1986 he prepared Tousa's and his wife's personal income tax returns. IO-1 at 19-20.[11] In connection with this work, DiGirlamo went to Tousa's home. *Id.*

Tousa was also arrested, indicted and convicted along with DiGirlamo and Simone in 1975 in connection with their gambling operation. IO-11 at ¶ 21.

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[11] At IO-1 at 19-20 Frank Tousa is referred to as Frank "Tusso." DiGirlamo does not dispute that this is the same man. *See* DiGirlamo Post-Hearing memoranda at 13-14.

VII. DIGIRLAMO'S KNOWLEDGE OF HIS ASSOCIATES' LCN CONNECTIONS

It must next be determined whether, during these purposeful contacts, DiGirlamo knew of the organized crime ties of his associates. It is clear that "[i]n the absence of direct evidence of knowledge of the organized crime ties of an associate . . . such knowledge may be inferred from the duration and quality of the association." *Investigations Officer v. Senese, et al., supra,* Decision of the Independent Administrator at 37.

A. Charles Moretina

DiGirlamo concedes that in addition to there being "evidence upon which [I] could find that Charles Moretina was a member of organized crime," there is also evidence upon which I could find that DiGirlamo "might have known that fact." DiGirlamo Post-Hearing Memorandum at 12. It is not surprising that DiGirlamo concedes this point. Given DiGirlamo's close relationship with C. Moretina, it would be inconceivable that DiGirlamo would not know of his father-in-law's organized crime connections. *See, e.g., Investigations Officer v. O'Brien,* Decision of the Independent Administrator at 25 (May 15, 1991), *aff'd, United States v. IBT,* 88 Civ. 4486 (DNE), slip op. (S.D.N.Y. September 11, 1991) ("[I]t strains credulity that [one] could be friends with . . . members . . . of La Cosa Nostra and not be aware of their organized crime connections."). *See also, Investigations Officer v. Cozza,* Decision of the Independent Administrator at 24-25 (January 4, 1991), *aff'd, United States v. IBT,* 764 F. Supp 797 (S.D.N.Y. 1991) ("[G]iven [respondent's]

long standing relationships with these men, it is inconceivable that he was unaware that they were infamous members of [Pittsburgh's] underworld.").

In addition, the organized crime. connections of C. Moretina were well publicized. As early as February 25, 1979, the *Kansas City Star* featured a prominent article naming C. Moretina as "perhaps the most noteworthy up-and-coming associate" of the Kansas City LCN. IO-5 ("The Mob: A Deadly Business").

DiGirlamo argues that he can only be found to have brought reproach upon the IBT if his associations with DiGirlamo and the others were "for an improper purpose, not innocent associations." DiGirlamo's Post-Hearing Submission at 37. DiGirlamo is mistaken. There is no such thing as an innocent, yet knowing and purposeful association between a union officer and an underworld figure. *See, e.g., Investigations Officer v. Trivigno,* Decision of the Independent Administrator at 14, n.7 (March 12, 1992), *aff'd United States v. IBT,* slip op. (S.D.N.Y. April 27, 1992) (to sustain a charge of knowing association their need not be any "indication that such association is part of a larger criminal conspiracy or that it is pursuant to the perpetration of an underlying predicate criminal act . . . "). *See also, Investigations Officer v. Cozza, supra,* Decision of the Independent Administrator at 25 ("The Investigations Officer need not establish either that [respondent] knew of the details of [his associate's] criminal activities or participated in any of their activities.").

In addition, the contacts between DiGirlamo and C. Moretina were not solely familial. *See Investigations Officer v. Salerno,* Decision of the Independent administrator at

27 (August 20, 1990), *aff'd, United States v. IBT,* 745 F. Supp 189 (S.D.N.Y. 1991) (prohibited association with brother); *Investigations Officer v. Chiavola,* Decision of the Independent Administrator at 9, n.9 (March 25, 1992), *aff'd, United States v. IBT,* slip op. (S.D.N.Y. April 21, 1992) (prohibited association with uncle). For example, while DiGirlamo claims, at p. 13 of his Post-Hearing Memorandum, that there are "a hundred of innocent familial reasons" why DiGirlamo's car may be parked outside of his father-in-law's house, he does not offer a single such reason why his car would be there during working hours along with the car of a Joint Council organizer.

In light of the foregoing, I find that DiGirlamo was aware of C. Moretina's LCN connections, and that DiGirlamo's contacts with C. Moretina were prohibited associations which brought reproach upon the IBT.

B. J. Moretina

Although there is no direct evidence demonstrating that DiGirlamo knew J. Moretina was involved in organized crime, there is sufficient evidence to infer such knowledge.

Not only did DiGirlamo have a close personal relationship with J. Moretina (he was his brother-in-law), DiGirlamo worked for J. Moretina's Company, "Be Amused," as its accountant. As with C. Moretina, it would be inconceivable for DiGirlamo not to have known of J. Moretina's organized crime ties given the nature of his relationships with him. *See Investigations Officer v. Cozza, supra,* Decision of the Independent Administrator at 24-25.

Again, it does not matter that DiGirlamo was not implicated in any of J. Moretina's wrongdoing. *See Investigations Officer v. Trivigno, supra,* Decision of the Independent Administrator at 14, n.7.[12]

As with C. Moretina, there can be no dispute that DiGirlamo's contacts with J. Moretina were more than merely familial. The most damning evidence in this regard was DiGirlamo's professional relationship with J. Moretina through Be-Amused.

Accordingly, I find that DiGirlamo brought reproach upon the IBT by knowingly associating with J. Moretina.

C. Simone

DiGirlamo has had a long relationship with Simone. DiGirlamo has known Simone since grade school. IO-1 at 144. Over the years, the two men have been involved in numerous sports activities together and have been in frequent contact because their "daughters are good friends, real close friends . . . " *Id.* at 151. Since 1980,

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[12] I do note, however, that DiGirlamo showed no real interest in separating himself from J. Moretina even after it became public that J. Moretina was involved in notorious activities. It was not until November 8, 1991, almost a full year after the FBI seized "Be Amused" 's poker machines, and many months after an indictment was brought against J. Moretina, that DiGirlamo delivered his openended resignation to J. Moretina. IO-1 at 77; IO-8. DiGirlamo's resignation did not end his relationship with "Be Amused." As late as March of 1992, DiGirlamo testified that he would still be helping "Be Amused" with its 1991 tax returns. IO-1 at 156-57. This was well after J. Moretina had pled guilty to laundering gambling proceeds through Be-Amused. IO-11 at ¶ 28.

DiGirlamo has been to Simone's home "a lot of times to pick up [his] daughter when she couldn't drive." *Id.* On several occasions DiGirlamo has been inside Simone's home and Simone has been to DiGirlamo's home. *Id.* In 1976, the two were also jointly indicted and convicted in connection with their illegal gambling operation. IO-11 at ¶¶ 21, 29. When questioned by the FBI, DiGirlamo stated that Simone, along with J. Moretina, hired him to do the accounting work for "Be Amused". IO-J at 2. When performing such work, DiGirlamo was in contact with Simone. IO-1 at 144. In fact, Simone called DiGirlamo at Local 41's offices. *Id.* at 165. Further, DiGirlamo admitted that he sometimes went to the location of Simone's illegal gambling hall to pick up "Be Amused" 's books from Simone, and that while there he would speak with Simone. IO-1 at 158-160; IO-6.

As with the Moretinas, the nature and quality of DiGirlamo's association with Simone necessary leads to the inference that he knew of Simone's LCN connections. Accordingly, I find that DiGirlamo brought reproach upon the IBT by knowingly associating with Simone.[13]

D. Tousa

In 1976, Tousa was indicted and convicted along with Simone and DiGirlamo in connection with the interstate gambling operation. On February 25, 1979, *The Kansas City Star* published an article entitled "Mobsters Share

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[13] Although not necessary to my conclusion, I do find that in regard to Simone, DiGirlamo did engage in criminal conduct with him as evidenced by their gambling convictions.

Neighborhood." That article reported that some of Kansas City's "highest ranking mobsters" all lived in the same neighborhood. Tousa, along with Carl Civella and Carl DeLuna, was named in the article. IO-5. DiGirlamo acknowledged that in the 1970's he had read something in the papers about Tousa's organized crime connections. IO-1 at 20. Thereafter, in 1981 DiGirlamo stated that he read a newspaper article which identified Tousa as the man who ran bookmaking operations for organized crime. *Id.* at 23.

Later on, in 1985 or 1986, DiGirlamo went to Tousa's home and did the personal tax returns for Tousa and his wife. IO-1 at 19-20.

Given all this, I must, and do, find that DiGirlamo knew of Tousa's organized crime links. Accordingly, I find that DiGirlamo brought reproach upon the IBT by knowingly associating with Tousa.[14]

VIII. THE PENALTY TO BE IMPOSED

An individual like DiGirlamo, who counts among his associates members of organized crime, has no place in the IBT. There is only one just and reasonable penalty to be imposed on an IBT Local Union employee who sees fit to continually associate with and, in fact, work for members of organized crime. The penalty is permanent debarment from the very Union upon which his conduct has brought reproach.

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[14] As with Simone, DiGirlamo participated in criminal wrongdoing with Tousa as evidenced by their gambling conviction.

By virtue or this Decision, DiGirlamo is permanently barred from the IBT. As a result, DiGirlamo must remove himself from all of his IBT-affiliated positions (including membership in the IBT), and draw no money or compensation, in any capacity, from any IBT affiliated source.

IX. BENEFITS

As is my practice, I invited DiGirlamo to submit a schedule of his benefits as well as a memorandum on the issues raised in imposing sanctions touching upon those benefits. DiGirlamo however, responded by stating the Investigations Officer had failed to establish any misconduct justifying any sanctions. DiGirlamo Post-Hearing Memorandum at 47. I disagree. Therefore, sanctions impacting upon DiGirlamo's benefits, to the extent they exist, are in order. *See Investigations Officer v. Senese,*. Supplemental Decision of the Independent Administrator (November 29, 1990), *aff'd, United States v. IBT,* 753 F. Supp. 1181. (S.D.N.Y. 1990), aff'd 941 F. 2d 1292 (2d Cir. 1991).

The first category of benefits to address are those that are administered by both IBT-affiliated persons and entities, on the one hand, and non-IBT affiliated persons and entities on the other. In the past, I have characterized such benefits as "Third-Party Plans." If DiGirlamo is a participant in any Third-Party Plan, I direct that the IBT and any affiliate that may contemplate making payments, not make, or discontinue making, payment of Union funds to such Third-Party Plans on DiGirlamo DiGirlamo's behalf. This ruling does not interfere with

DiGirlamo's right to receive any benefits that may have already vested in such plans.

In addition, to the extent the IBT or any IBT-affiliated entity contemplates making a payment of any benefits to DiGirlamo which are under its exclusive control, they are hereby directed not to make such payments.

Lastly, it is well-settled that union officials charged with misconduct and found to have committed misconduct may not have their legal fees paid by the union. *See, e.g., United States v. Local 1804-1, et al.*, 732 F. Supp. 434, 437 (S.D.N.Y. 1990). Thus, no IBT-affiliated entity may make any contribution to DiGirlamo's attorney's fees in connection with this charge.

A. Application to Judge Edelstein

Given the extensive nature of DiGirlamo's involvement with the Kansas City Family of La Cosa Nostra, it is in the best interest of the IBT that DiGirlamo immediately be purged from the Union. Accordingly, I will not voluntarily stay this Decision. The penalties imposed herein shall take effect immediately.

Notwithstanding the fact that I have not stayed this Decision nor the penalties imposed, I will submit this Decision to the Honorable David N. Edelstein for his review and approval by way of Application in accordance with the procedure set forth in the Consent Order.

/s/ Frederick B. Lacy
Frederick B. Lacey
Independent Administrator

Dated: January 20, 1993

(2)

No. 94-156

Supreme Court, U.S.
FILED
AUG 24 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NICHOLAS A. DIGIRLAMO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

-and-

CHARLES M. CARBERRY, ESQ.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT CHARLES M. CARBERRY IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT CHARLES M. CARBERRY IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. A1-A16) is reported at 19 F.3d 816. The district court's opinion (Pet. App. C1-C23) is reported at 824 F. Supp. 410.

JURISDICTION

The court of appeals denied petitioner's petition for rehearing on April 22, 1994. The petition for a writ of certiorari was filed on July 21, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. In 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990), against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. (Pet. App. A2.) The complaint alleged that the IBT had long been under the control of organized crime, and sought equitable relief to rid the union of such control. *See United States v. International Bhd. of Teamsters*, 905 F.2d 610, 612-13 (2d Cir. 1990). In 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. (Pet. App. A3; C.A. App. A1-A28; text of Consent Decree.)

The principal goal of the settlement and consent decree is to wrest the union from the influence of organized crime and establish a new system of rank-and-file election of IBT officers. (Consent Decree 2); *United States v. International Bhd. of Teamsters*, 931 F.2d 177, 180-81 (2d Cir. 1991); *United States v. International Bhd. of Teamsters*, 764 F. Supp. 787, 788 (S.D.N.Y.), *aff'd mem.*, 940 F.2d 648 (2d Cir.), *cert. denied*, 112 S.Ct. 76 (1991). The Consent Decree also provides for the appointment of an Investigations Officer to investigate corruption and misconduct within the union and an Independent Administrator whose duties include hearing and deciding union disciplinary charges. (Pet. App. A3.) The authority of the Independent Administrator and Investigations Officer expired in 1992, with certain limited exceptions including the authority to resolve to completion and decide all charges already filed by that time by the Investigations Officer. (Consent Decree 3.)

Under the consent decree, a party facing a disciplinary charge brought by the Investigations Officer has the right to notice and a hearing before the Independent Administrator. (Consent Decree 9.) The hearings are conducted

in the same manner as labor arbitration proceedings. (*Id.*) The Administrator's decision is then subject to review by the district court. (*Id.* at 10.) The decree states that in reviewing such decisions, the district court shall apply the same standard of review a federal court applies to administrative decisions under the Administrative Procedure Act. (*Id.* at 25.)

The consent decree enjoins any union member from knowingly associating with "any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonnano Organized Crime Family of La Cosa Nostra [and] any other Organized Crime Families of La Cosa Nostra or any other criminal group." (Consent Decree 6.) The consent decree specifically provides that "[t]he IBT Constitution shall be deemed and hereby is amended to incorporate and conform with all of the terms set forth in this order." (Consent Decree 5.)

2. The Investigations Officer filed disciplinary charges against petitioner on May 14, 1992. The charges alleged that petitioner had violated Article II, § 2(a) of the IBT Constitution, which has long required every member to conduct himself in a manner which will not "bring reproach upon the union," by "knowingly associat[ing] with members of La Cosa Nostra ("LCN"), including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone, and Frank Anthony Tousa." [1]

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[1] The Investigations Officer also charged petitioner with knowingly associating with LCN associates Nicholas Joseph LaBruzzo and John Anthony Costanza. However, the Independent Administrator found that, on the record before him, there was not sufficient evidence to establish the LCN ties of LaBruzzo and Costanza. (Pet. App. D12.) The charge against petitioner in its entirety provides:

> While a member and employee of IBT Local 41, you brought reproach upon the IBT and violated your membership oath in

Petitioner sought a hearing before the Independent Administrator. Before the hearing, the Investigations Officer provided petitioner with all the evidence that would be offered against him at the hearing. (Pet. App. C17.) In a written decision dated January 20, 1993, the Independent Administrator found the charge proved after a hearing. Distinguishing contacts which are "incidental or fleeting" from those proved at the hearing, the Administrator found it "clear" that petitioner "has purposefully associated with C. Moretina, J. Moretina, Simone and Tousa." (Pet. App. D13.) Evidence of petitioner's knowing association with LCN members included petitioner's own admissions, his gambling conviction, results of physical and electronic surveillance, and corroborated statements of reliable informants. (Pet. App. D13-D22.) Based on the hearing record, the Independent Administrator found that "[a]n individual like [petitioner], who counts among his associates members of organized crime, has no place in the IBT" (Pet. App. A22), and, accordingly, expelled petitioner from the IBT and prohibited him from drawing any funds from the IBT or its affiliates. (Pet. App. A23.)

3. The Independent Administrator's decision was submitted to the district court for review. The district court determined that the sanction was both supported by the evidence and consistent with the IBT Constitution. (Pet. App. C1-C23.) The district court also rejected petitioner's contentions—raised for the first time in that court—

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violation of Article II, Section 2(a) and Article XIX, Section 7(b)(1) and (2) of the IBT Constitution, *to wit*:

From 1978 to the present, while a member and employee of IBT Local 41, you knowingly associated with members of La Cosa Nostra ("LCN"), including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone, and Frank Anthony Tousa. From 1978 to the present, you also knowingly associated with associates of LCN including, but not limited to, John Anthony Costanza and Nicholas Joseph LaBruzzo. (Pet. App. A3-A4 at n.1.)

that the disciplinary charges filed against him, as well as the provisions of the IBT constitution prohibiting conduct bringing "reproach" upon the union, lacked the specificity required by the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-531 (1988). Quoting the court of appeals' decision in *United States v. International Brotherhood of Teamsters*, 941 F.2d 1292, 1298 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1161 (1992), the district court concluded that, " 'because it should have been clear . . . that associating with known members of organized crime would bring reproach upon the IBT, sanctioning [petitioner] for these activities is not constitutionally infirm.' " (Pet. App. C16-C17.)

4. The United States Court of Appeals for the Second Circuit affirmed. The court rejected petitioner's contentions under the LMRDA, relying primarily on its holding in an earlier case that "IBT members were aware that association with organized crime figures was prohibited even *before* the Consent Decree added the provision to the union constitution" and that the decree " 'simply made explicit the longstanding goal of the IBT to be free of corruption.' " (Pet. App. A14 (quoting *United States v. International Bhd. of Teamsters*, 941 F.2d at 1297).) The court further found that, even assuming "the existence of hypothetical situations in which the [constitutional] prohibitions would be considered vague," petitioner's "is not such a case" as " 'it should have been clear to [union members disciplined for associating with LCN] that associating with known members of organized crime would bring reproach upon the IBT.' " (Pet. App. A14 (quoting *United States v. International Bhd. of Teamsters*, 941 F.2d at 1298).)

The court also rejected petitioner's argument that he was denied a reasonable amount of time to prepare for his disciplinary hearing, finding that petitioner did not raise the argument of insufficient time to prepare at the

hearing and did not move for an adjournment or continuation of the hearing in order to prepare further. (Pet. App. A15.) The court noted that the Administrator offered petitioner the "usual opportunity" to file post-hearing submissions. (Pet. App. A15.)

REASONS FOR DENYING THE WRIT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Because the issues presented by petitioner are fact specific and the authority of the Independent Administrator and Investigations Officer has, with limited exceptions, already expired, his case presents no issue of continuing importance warranting further review by this Court.

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BOILERMAKERS v. HARDEMAN*, 401 U.S. 233 (1971).

The Consent Decree provides that a union member charged with a disciplinary violation must be served with "written specific charges." (C.A. App. 9.) That provision directly parallels the LMRDA, 29 U.S.C. § 411(a)(5)(A).[2] The courts have noted that the degree of specificity required to meet the statutory standard is fact specific and "will, of necessity, vary from case to case,"

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[2] Section 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5), provides:

> Safeguards against improper disciplinary action. — No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Gleason v. Chain Service Restaurant, 300 F. Supp. 1241, 1251 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 342 (2d Cir. 1970), and have uniformly held that, under the LMRDA, union disciplinary charges need not meet the standards of a criminal indictment or even civil pleadings. *See Berg v. Watson*, 417 F. Supp. 806, 810 (S.D.N.Y. 1976) ("the strict requirements of a criminal prosecution need not be complied with"); *Jacques v. Local 1418, Int'l Longshoremen's Ass'n*, 246 F. Supp. 857, 859 (E.D. La. 1965) ("We do not expect union officials to frame their charges and specifications technically as formal legal pleadings"), *aff'd*, 404 F.2d 703 (5th Cir. 1967). "Union charges need only 'be so drafted as to inform a member with reasonable particularity of the details of the charges.'" *Eisman v. Baltimore Regional Joint Bd.* 352 F. Supp. 429, 435 (D. Md. 1972), *aff'd*, 496 F.2d 1313 (4th Cir. 1974). Accordingly, the principal question concerning the specificity of a charge is whether it is "specific enough to inform the accused member of the offense that he has allegedly committed." *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 245 (1971) (internal quotations omitted).

The Second Circuit correctly found the charge in this case contained the specificity required by the LMRDA. The charges informed petitioner that he had been charged with violating of Article II, § 2(a) and Article XIX, §§ 7(b)(1) and (2) of the IBT Constitution by "knowingly associat[ing] with members of La Costa Nostra ("LCN"), including, but not limited to, Charles Moretina, James J. Moretina, Peter Joseph Simone, and Frank Anthony Tousa." Petitioner was also given the evidence against him in advance of the hearing before the Independent Administrator. He cannot therefore credibly claim that he was unaware of the offense that he had been charged with committing or that he "had been misled or otherwise prejudiced in the presentation of his defense." *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. at 245.

Nor can petitioner demonstrate, as he claims, that "the court of appeals' holding, that the charge complies with the LMRDA requirement of specificity and fair hearing, conflicts with decisions of this Court and other circuits." (Pet. 10.) *International Brotherhood of Boilermakers v. Hardeman*—the only purportedly conflicting case in this Court that petitioner cites—reaffirmed a union member's right under the LMRDA to "written specific charges" and, consistent with the Second Circuit decision, held on the specific facts of that case that the union's charge was sufficiently specific to satisfy the LMRDA. 401 U.S. at 245. None of the remaining cases petitioner cites on the specificity requirement are circuit court decisions and, in any event, all are fact-specific applications of the LMRDA's requirements to the specific charges in those cases. *See Berg v. Watson*, 417 F. Supp. at 810 (notice specified that plaintiff "violated his oath of obligation on or about June 15, 1973 in that he refused to comply with an order given by me in my capacity as a Business Agent"); *Eisman v. Baltimore Regional Joint Bd.*, 352 F. Supp. at 435 (charge that union member had acted in an unbecoming manner at October 23 meeting insufficient where hearing focused on member's activities on other dates)[3]; *Gleason v. Chain Service Restaurant*, 300 F. Supp. at 1251 (reviewing nine charges); *Jacques v. Local 1418, Int'l Longshoremen's Ass'n*, 246 F. Supp. at 859 (specifications—including a charge that accused "and his public record is not exemplary"—had no "reference to any particular time, place or circumstances and acts, as required by the Union's By-laws"). Furthermore, in none of the cases was there any indication, as here, that the accused had received the evidence that would be offered against him in advance of the hearing. Accordingly, even if these remaining decisions were from courts of appeals,

[3] Contrary to petitioner's assertion, the court "assum[ed] that the charges were sufficient to give appropriate notice of allegedly improper conduct by plaintiff at the meeting of October 23 . . . ." 352 F. Supp. at 436.

they are distinguishable on their facts and do not conflict with the decision of the Second Circuit.

II. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONER'S CLAIM THAT THE IBT CONSTITUTION IS VAGUE.

Citing *Semancik v. United Mine Workers District #5*, 466 F.2d 144, 157 (3d Cir. 1972), and several decisions interpreting the term "association" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990), petitioner contends that provisions of the IBT constitution which prohibit "knowingly associating" with any member or associate of an organized crime group and conduct bringing "reproach" upon the Union are vague and therefore failed to give him adequate notice of the conduct that was prohibited. Petitioner does not dispute the court of appeals' finding that "IBT members were aware that association with organized crime figures was prohibited even *before* the Consent Decree added the provision to the union constitution" and that "[t]he new provision 'simply made explicit the longstanding goal of the IBT to be free of corruption.'" (Pet. App. A15; *see* Pet. 23 (admitting that "purpose of the Consent Decree was to eliminate 'corruption of any part of the IBT'").) Instead, he mischaracterizes the evidence concerning his association with known LCN members—he allegedly had merely "unpublicized legitimate professional or familial associations unrelated to union affairs and involving no misconduct on his part"—and asserts that, because this evidence was found sufficient to satisfy the prohibitions in the union constitution, the constitution must be vague. (Pet. 21-24.)

Petitioner's vagueness claim plainly depends on acceptance of his specific version of the facts, which has been considered and rejected by the court of appeals, the district court and the Independent Administrator. After rejecting petitioner's contention that his associations with

certain LCN members constituted only "innocent familial or professional associations," the court of appeals added, "for purposes of portraying a complete picture, that some evidence further suggested that [petitioner] not only associated with organized crime figures, but that he may also have served as an instrument of LCN influence on Local 41." (Pet. App. A11-A13.) The record evidence, moreover, is replete with indications that petitioner knew or should have known that his conduct brought reproach upon the union.[4] Accordingly, the court of appeals correctly found that "[petitioner's] contacts with LCN members clearly constituted conscious choices" that cannot be explained away as innocent familial or business relationships. (Pet. App. A12.)

Furthermore, neither *Semancik* nor any of the cases petitioner cites interpreting the RICO statute conflicts with the Second Circuit decision. The prohibition in *Semancik* precluded any union member from "resorting to dishonest or questionable practices to secure the election or defeat of any candidate for district office" and, unlike the IBT provision, "put the members at their peril whenever they exercised their free speech rights." 466 F.2d at 147, 150. Similarly, the cases petitioner cites applying a different test of "association" under the RICO statute are also inapposite. (*See* Pet. 25-26 (citing *Reeves v. Ernst & Young*, 113 S.Ct. 1163 (1993); *University of Maryland v. Peat, Marwick and Main, Co.*, 996 F.2d 1534 (3d Cir. 1993); *United States v. Ricco-*

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[4] *E.g.*, C.A. App. 408-10 (petitioner took pains to conceal his connection with LCN figures); C.A. App. 229, 422 (petitioner denies during his deposition meeting with IBT organizer and C. Moretina at his residence, although physical surveillance places them there); C.A. App. 314, 315 (newspaper accounts indicating that petitioner's relationship to organized crime brought reproach upon the IBT). Indeed, petitioner himself recognized that, in 1991, after Peter Simone was identified in newspaper stories as an LCN member, "that's when I felt that . . . I'm possibly putting my job up at risk . . . ." (C.A.App.274.) Even then, petitioner did not end his relationship with Simone. (C.A. App. 277-78, 377.)

bene, 709 F.2d 214, 220-21 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983).) The test for association under RICO requires that the defendant have participated in the RICO enterprise's affairs. *E.g., Estee Lauder, Inc. v. Harco Graphics, Inc.*, 621 F. Supp. 689, 691 (S.D.N.Y. 1984). To prove an impermissible association in violation of the IBT Constitution, the Investigations Officers must show that the respondent had purposeful contacts with members of organized crime which were neither fleeting nor incidental. *E.g., United States v. International Bhd. of Teamsters (Adelstein)*, 998 F.2d 120, 125 (2d Cir. 1993). The "association" under RICO is, therefore, not analogous to the "association" under the IBT Constitution. Not surprisingly, petitioner does not cite any case that accepts his contention that the standard for "association" under RICO applies to "association" in violation of the IBT Constitution.

In sum, petitioner cannot demonstrate that the decision of the court of appeals conflicts with any ruling of this Court or of any other court of appeals. Moreover, the issues presented by petitioner are unique to the temporary arrangement established by the 1989 consent decree between the IBT and the United States. Under the terms of the decree, the authority of the Independent Administrator and the Investigations Officers expired in 1992. (Consent Decree 3.) This case thus presents no issue of continuing importance warranting further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 24, 1994

Supreme Court, U.S.
FILED
SEP 9 1994
OFFICE OF THE CLERK

No. 94-156

In The

Supreme Court of the United States

October Term, 1994

NICHOLAS A. DIGIRLAMO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

--and--

CHARLES M. CARBERRY, ESQ.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I

IMPORTANCE OF THE QUESTION PRESENTED.

Respondent Carberry misleadingly argues that this case presents no issue of continuing importance because:

> "[t]he issues presented by petitioner are unique to the temporary arrangement established by the 1989 consent decree between the IBT and the United States. Under the terms of the decree, the authority of the Independent Administrator and the Investigations Officer expired in 1992." (Resp. 11).[1]

It is true that the authority of the Independent Administrator and the Investigations Officer have expired but the questions presented are far broader than the procedures followed by those officials. The important and continuing issues here are as to what constitutes a sufficiently specific charge and a full and fair hearing necessary to comply with the mandate of the LMRDA **which will govern union disciplinary hearings so long as that statute remains extant.**

We also point out that the disciplinary authority under the Consent Decree is now vested in a three member Internal Review Board (IRB) which "may be considered a successor to the Investigations Officer and the Independent Administrator." *United States v. IBT,* 803

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[1] References to the Respondent's Brief are "(Resp . . .)." References to the Petition for Certiorari are "(Pet . . .)"; to the appendix to the Petition are "(Pet. App . . .)" and to the Appendix in the Court of Appeals are "(C.A. App . . .)."

F.Supp. 761, 769 (S.D.N.Y. 1992), aff'd in relevant part, 998 F.2d 1102 (2d Cir. 1993). When the authority of the Investigations Officer and Independent Administrator ceased, their functions were taken over by the IRB. Section G of the Consent Decree (C.A. App. 19-22) sets out the structure of the IRB and the scope of its authority. Judge Frederick B. Lacey, the former Independent Administrator, is a member of the Board. The Board has the same broad investigative authority as that previously held by the Investigations Officer and Respondent Carberry, the former Investigations Officer, is the Chief Investigator of the Board. The procedures followed by the IRB vary only in one respect. Under the prior procedure the Investigations Officer would investigate and initiate disciplinary charges which then would be heard by the Independent Administrator (C.A. App. 8-9). Under present disciplinary procedures upon completion of an investigation the IRB issues a written investigative report detailing the findings, charges and recommendations which are referred to an appropriate IBT entity. The IBT entity must make written findings setting forth the action taken and the reason for that action. If the IRB concludes that the IBT entity has not taken satisfactory action a hearing is then held before the IRB.

The problems as to lack of specificity remain. The IRB continues to make the same type of non-specific charges as employed in the instant case. In *U.S. v. IBT*, 853 F.Supp. 757 (S.D.N.Y. 1994) Judge Edelstein affirmed the decision of the IRB permanently debarring Patrick C. Dellorusso from the IBT. The nonspecific charges were:

Charge One

"While an IBT member, you brought reproach upon the IBT and violated your membership oath in violation of Article II, Section 2(a) and Article XIX, Section 7(b)(1),(2) and (9), to wit:

While a member of IBT Local 295, you were a member of organized crime.

Charge Two

While an IBT member, you brought reproach upon the IBT and violated your membership oath in violation of Article II, Section 2(a) and Article XIX, Section 7(b) (1), (2) and (9), to wit:

While a member of IBT Local 295, you knowingly associated with members of La Cosa Nostra, including but not limited to, Alphonse D'Arco and Louis Daidone."

The scope of the questions presented extends even beyond the construction of the due process protections of the LMRDA and is pertinent to all disciplinary actions by administrative tribunals. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) dealt with the procedures followed under Section 405 of the Surface Transportation Assistance Act of 1982 (49 USC Appendix § 2305) which protects employees in the motor transportation industry from retaliatory discharge. The court by a six Justice majority held that the Secretary of Labor's failure to inform the employer of the names of witnesses and the substance of the evidence of the employee's complaint before ordering the discharged employee's temporary reinstatement violated due process. The trucking company was afforded an opportunity to meet with the investigator and submit a written statement detailing the basis

for the driver's discharge but it was not provided with the names of the other witnesses or the substance of their statements (481 U.S. at 256). The procedure established by the Secretary of Labor did not require the Secretary to divulge the names of the witnesses from whom the investigator has obtained statements supporting the employee's complaint or the substance of their statements before preliminary reinstatement (481 U.S. at 260). Writing for a four Judge plurality Justice Marshall said:

> "Notice of an employee's complaint of retaliatory discharge and of the relevant supporting evidence would be of little use if an avenue were not available through which the employer could effectively articulate its response." (481 U.S. at 265).

Justices Brennan and Stevens would have gone further than the Court plurality, who required only that the witnesses be identified so that the employer could prepare a meaningful response. Both Justices would require that where there are disputed factual questions critical to the issue, the employer should be given an opportunity to cross-examine the unidentified witnesses who oppose its version of the facts (481 U.S. at 269-70; 275-78).

Although here it is the right of the employee, not the employer, to a fair hearing, his rights to "effectively articulate" his response is no less than that of the employer, if not more so.

II

RELEVANT LANGUAGE OF UNION CONSTITUTION IS VAGUE.

Petitioner contends that, as applied to his case, the union constitution and the Consent Decree are impermissibly vague and overbroad in the relevant provisions prohibiting bringing "reproach" upon the union by "knowingly associating" with members of organized crime, and thus failed to give him adequate notice of the prohibited conduct. Respondent strangely argues that the inadequacies were cured by the finding of the Court of Appeals that "IBT members were aware that association with organized crime figures was prohibited even before the Consent Decree added the provision to the union constitution and that "[t]he new provision simply made explicit the long standing goal of the IBT to be free of corruption" (Pet. App. A15).

But this finding of the court of Appeals does not clarify the vague terms. Granted that union members were aware that "association with organized crime figures was prohibited and that the goal was for the IBT "to be free of corruption" this finding merely restates the vague provisions of the constitution and the Consent Decree. The question still remains. Was the language such as to put a reasonable person on notice that unpublicized, legitimate professional or innocent familial association unrelated to Union affairs and involving no misconduct would be prohibited and the basis for disciplinary action?

Respondent argues that Petitioner's vagueness claim "depends on acceptance of his specific version of the facts, which has been considered and rejected by the

Court of Appeals" (Resp. 9). But Petitioner does not rely on "his version" but on the fact findings of the Court of Appeals (See Pet. 8-9). It is Respondent's version of the facts which goes beyond the Court's findings.

Respondent states that "The record evidence, moreover, is replete with indications that petitioner knew or should have known that his conduct brought reproach upon the union." (Resp. 10). He supports this statement with references to the appellate appendix (Resp. n.4) which we now cover, seriatim.

(1) "Petitioner took pains to conceal his connection with LCN figures. (C.A. App. 408-10)." The reference is to a 1976 FBI report, which was two years prior to Petitioner's joining the union in late 1978.

(2) "Petitioner denied meeting with an IBT organizer and C. Moretina at his residence though physical surveillance places him there." (C.A. App. 229, 422). The sole evidence was (C.A. App. 422) that his car was parked outside Moretina's house.

(3) "Newspaper accounts indicating that Petitioner's relationship to organized crime brought reproach upon the IBT." (C.A. App. 314-315). The 1981 news item simply recounts that Petitioner was hired as an accountant (in fact bookkeeper) for the local and had previously pled guilty to operating a gambling business in 1977 prior to his becoming a union member and unrelated to union affairs. The second news item merely reports Petitioner's termination in a change of union leadership in 1985. These are the only news items as to Petitioner in the 14 years of his union membership.

(4) Respondent then argues that after Peter Simone was identified in a 1991 news story as an LCN member "that's when I felt that . . . I'm possibly putting my job at risk . . . " (C.A. App. 234). Even then petitioner did not end his relationship with Simone. (C.A. App. 277-78, 377).

But Petitioner did resign as accountant for "Be Amused" in November 1991, six months before the charges were brought against him.

The above items are hardly proof of a record "replete with indications that Petitioner knew or should have known that his conduct brought reproach upon the union."

Respondent does not challenge Petitioner's statement (Pet. 24) that:

> "There was no evidence that any of the associations of Petitioner with alleged LCN members was for an improper purpose or that he was guilty of any misconduct during the fourteen years of his union membership or that the criminality of these persons he was found to have associated had any relation to corruption of the union."

III

RELIANCE ON UNCORROBORATED STATEMENT OF A CONFIDENTIAL INFORMANT DENIED A FAIR HEARING.

To argue that Petitioner's associations were not only "innocent familial or professional associations" the Respondent cites the statement in the Court of Appeals' decision that:

> "The Above is sufficient to demonstrate that DiGirlamo engaged in prohibited association, **even if the association was not for an improper purpose. Without relying on other evidence for our decision**, however, it should be noted, for purposes of portraying a complete picture, that some evidence further **suggested** that DiGirlamo not only associated with organized crime figures, but that he may also have served as an instrument of LCN influence on Local 41. (Emphasis ours)
>
> * * *
>
> In 1990, a confidential FBI informant stated that LCN used DiGirlamo to keep apprised of Local 41's financial status so that Johnson could not cite lack of funds as grounds for refusing to follow LCN orders (Pet. App. 13)."

As it indicated, the Court of Appeals did not rely on this evidence for its decision, and we believe it would have been improper to do so. It was the unreliable hearsay statement of an FBI agent as to the oral statement of a "confidential informant." The Agent admitted that it was not corroborated by any other evidence (Pet. A 77). It was denied by the union president and Petitioner and was not even referred to by the Administrator or the District Court in their decisions.

The agent testified that the statement was not a statement of a fact by the informant but his conclusion; that the financial statements are public to the union members and that the monthly reports of the treasurer to the union meeting would contain the information (Pet. A. 77-78). Other than the second-hand hearsay there was no evidence that Petitioner ever gave any financial information

to an LCN figure or was an "instrument of LCN influence" on the union.

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987), supra, as to the right to be provided names of witnesses, supports Petitioner's position that use of the uncorroborated and unreliable double hearsay statement of a "confidential informant" is a denial of a fair hearing. The statement of the informant not only was a conclusion but gave Petitioner no basis for evidence to contradict it. It did not give any facts as to times, places, persons to whom such information may have been given, or what information was given. By not being given the name of the witness Petitioner was denied the right to cross-examine him. The cross-examination of the FBI agent did not solve this problem. He knew nothing other than the oral statement of the informant, which he merely repeated.

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